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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM O. MOZEE, *et al.*,
Petitioners,

v.

AMERICAN COMMERCIAL MARINE SERVICE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal statutes creating or adjusting civil remedies are prospective only, unless the statute specifies some degree of retroactive effect, see *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), or whether a court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or the statute specifies that it is prospective only, see *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974).

2. Whether the Civil Rights Act of 1991 in general, and §§ 101, 102, and 105 of that Act in particular, should be applied to any cases pending at the time of enactment.

PARTIES BELOW

The parties below include the named plaintiffs—William O. Mozee, Gregory L. Rankin, Frederick Williams, Joe L. Malone, and Harold Barnes—and two certified classes of black employees of Jeffboat, Inc., of Jeffersonville, Indiana, in the 1970s and 1980s. Jeffboat subsequently became a division of Respondent. The appeal to the Seventh Circuit and this petition have been filed on behalf of the five named plaintiffs and the two certified classes.

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OPINIONS BELOW

The May 7, 1992 opinion of the court of appeals (Pet. App. A pp. 1a-24a), as clarified by order of May 18, 1992, denying Petitioners' and Respondent's petitions for rehearing and ruling on the effect of the Civil Rights Act of 1991, is reported at 963 F.2d 929. The August 14, 1991 opinion of the court of appeals on interlocutory appeal of the liability issues (Pet. App. B pp. 25a-63a) is reported at 940 F.2d 1036. The district court opinions relating to the liability issues are not reported. Copies of other opinions in this case, which address issues other than those presented herein, have been lodged with the Clerk of the Court.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1991. The court of appeals denied the Respondent's timely petition for rehearing on May 7, 1992, and issued a clarifying order on May 18, 1992, to specify that the Court had also denied Petitioners' timely petition for rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Selected sections of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, are reproduced at Pet. App. C, pp. 64a-74a. Section 1977 of the Revised Statutes, 42 U.S.C. § 1981 (1988), is reproduced at Pet. App. D, p. 75a.

STATEMENT

A. The District Court Proceedings.

Petitioners William O. Mozee, Gregory L. Rankin, Frederick Williams, and Joe L. Malone filed this individual and class action in the United States District Court for the Southern District of Indiana in 1977, charging that Respondent's employment practices violated §§ 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a) (1988), and § 1977 of the Revised Statutes (formerly § 1 of the Civil Rights Act of 1866), 42 U.S.C. § 1981 (1988). Pet. App. 26a-29a. Petitioners sought injunctive relief, back pay, and, under their § 1981 claims, compensatory and punitive damages. The district court consolidated that action with one filed subsequently by petitioner Harold Barnes, and certified one class for Title VII claims and a second for § 1981 claims.

On March 17, 1988, after a second non-jury trial,[1] the district court held Respondent liable to the class under

[1] The district court had ruled for the Respondent in 1983 after the first trial, but the court of appeals reversed and remanded on

Title VII and § 1981 for intentionally maintaining a system-wide pattern of discriminatory promotions and disciplinary actions (including unlawful retaliations and discharges). The court also found Respondent liable to the class under Title VII for maintaining a promotion system and a disciplinary and discharge system which had unlawfully disparate impacts on black employees. The court further ruled that Respondent had intentionally discriminated or retaliated in various ways against each of the five individual plaintiffs in violation of Title VII and, as to Mozee and Barnes, in violation of § 1981 as well.[2]

On June 5, 1989, in *Patterson* v. *McLean Credit Union*, 491 U.S. 164, this Court held that § 1981's right to "enforce contracts" does not embrace claims associated with post-hiring conditions of employment. 491 U.S. at 176, 177. On September 6, 1989, the district court denied Respondent's motion to reconsider its liability in light of *Patterson*.

On June 7, 1990, the district court granted Respondent's motion for certification of an interlocutory appeal on liability issues. On the same day, the court awarded back pay under Title VII to the five named plaintiffs and consequential damages under § 1981 to Mozee and Barnes. It scheduled further hearings on back pay and damages for the remaining class members and on all requests for punitive damages under § 1981, attorneys' fees, and injunctive relief. Those hearings have not yet taken place.

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the grounds, *inter alia*, that the district court had failed to issue sufficient findings of fact and to consider Petitioners' statistical evidence of disparate treatment of black and white employees. *Mozee* v. *Jeffboat, Inc.*, 746 F.2d 365 (7th Cir. 1984).

[2] The § 1981 claims of Malone, Rankin, and Williams were barred by the statute of limitations.

B. The Court of Appeals' Decisions.

The court of appeals permitted Respondent's interlocutory appeal on liability issues and, on August 14, 1991, affirmed Title VII liability for class-wide discrimination in promotion practices under both disparate impact and disparate treatment theories (Pet. App. 39a-43a, 53a-55a); vacated the district court's rulings of class-wide Title VII liability for discriminatory discipline and remanded these claims for further review (*id.* 44a-49a, 54a-55a); and, relying on *Patterson*, reversed all the district court's findings of liability (individual and class-wide) under § 1981. *Id.* 55a-62a.[3]

Both Petitioners and Respondent sought rehearing. The Civil Rights Act of 1991 was enacted on November 21, 1991, while their petitions were pending. Section 101 of the Act effectively overrules *Patterson*'s construction of § 1981 by defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Pet. App. 65a. Section 102 of the Act adds a new § 1977A to the Revised Statutes, 42 U.S.C.A. § 1981a (West Supp. 1992), which entitles plaintiffs alleging intentional discrimination in Title VII actions to a jury trial and additional remedies of compensatory damages (limited in amount) and punitive damages, if they cannot recover such damages under § 1981. *Id.* 65a-66a. And § 105 of the Act adjusts the burdens of proof and legal rules in Title VII disparate impact cases, in response to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). *Id.* 70a-71a.

The court of appeals called for supplemental briefs on the new Act's applicability. Petitioners principally argued that § 101 of the new Act should be applied to rein-

[3] The court of appeals also affirmed the rulings finding Respondent liable to the individual Petitioners under Title VII. Pet. App. 29a, 63a.

state the liability rulings below under § 1981. They also argued that the court of appeals should direct the district court on remand of the Title VII disciplinary practices claims to reject Respondent's business necessity argument in light of § 105 of the new Act.[4] On May 7, 1992, the court ruled that the Act should not be applied to the case, either on appeal or on remand. Pet. App. 17a, 18a, 21a.

The court found no guidance concerning Congress's intent on the issue of retroactivity in the Act's language or legislative history. Hence it turned to "judicially derived rules of construction," where it found "two seemingly contradictory lines of cases" from this Court. *Id.* 8a, 10a.

The first stands for the principle that a court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice by divesting a party of a matured right or there is statutory language or legislative history to the contrary. *Id.* 8a-9a, 13a, citing *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711 (1974), and *Thorpe* v. *Housing Auth. of Durham*, 393 U.S. 268, 281 (1969).

The second stands for the principle that retroactivity " 'is not favored in the law' " and therefore statutes " 'will not be construed to have retroactive effect unless their language requires this result.' " *Id.* 9a, 10a, quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Stepping up to "the difficult task of reconciling" the two lines of cases, the court found *Bowen*'s rule of prospectivity to be the general rule, and that the *Thorpe-Bradley* rule applies only "in a narrow category of cases." *Id.* 11a, 12a. The court gave *Bowen* primacy based on a

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[4] With respect to § 102 of the new Act, Petitioners pointed out that its damage provisions would have essentially no effect on the case if § 101 was applicable, because § 1981 allows compensatory and punitive damages and duplicative damages are not allowed by § 102, and that there was no jury trial issue in the case because they had not demanded a jury trial below and had no intention of doing so.

perceived historical tradition in favor of applying new statutes prospectively and on "notions of fairness because parties should only be held accountable for the laws at the time of their conduct." *Id.* 12a (citing *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Next, relying on *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), the court ruled that *Thorpe-Bradley*'s rule of retroactivity does not include cases in which a new statute's provisions "impact[] substantive rights and obligations[.]" *Id.* 13a. The court implicitly held that § 101 of the Act is "substantive," and thus its ruling relieves Respondent of accountability for post-hiring discriminatory conduct that not only is proscribed by the 1991 Act but also was proscribed by § 1981 at the time Respondent's conduct occurred—that is, before *Patterson*.

The court also held that the "general rule of *Bowen* applies when a statute changes the trial procedural rules once the matter is on appeal," although it did not specify which provisions of the new Act change "trial procedural rules." *Id.* 16a. The court distinguished *Thorpe* on the grounds that retroactive application of an administrative rule was necessary in that case to protect against potential "constitutional due process problems," issues not present in this case, and that no duplicative proceedings were required by *Thorpe*'s ruling, whereas here the retroactive application of the 1991 Act's procedural provisions could require a new trial and could, therefore, double expenses. *Id.* 15a.

Next, the court of appeals concluded that *Bradley*'s rule of prospectivity may apply only to attorney fee provisions and, "at the most, applies when evaluating damage provisions that do not affect substantive rights[.]" *Id.* 17a. It found no need to resolve the applicability of the damage provisions of § 102, however, because the instant case was on interlocutory appeal on liability alone. *Id.* 21a.

Finally, the court ruled that the Act's "new procedural and damage provisions" would not apply in the district court on remand. *Id.* The court mentioned several sound reasons why those provisions should be applied retroactively to conduct being assessed in "an entirely new proceeding," but concluded that the proceedings on remand would *not* be entirely new and therefore the application of the new provisions would be "both inequitable and confusing." *Id.* 21a. That ruling bars applicability of § 105 of the new Act to the remanded liability issues, and relieves Respondent of liability for compensatory and punitive damages under § 102 of the 1991 Act on all claims, even though no back pay or damage proceedings on any claims of class members (other than the five individual Petitioners) have yet been held in the district court.

Judge Cudahy dissented, noting that the liability-creating acts in this case—"acts of intentional racial discrimination allegedly pervading the employment relationship"—occurred many years before *Patterson* was decided, and, the 1991 Act having overruled *Patterson*, the law today "is the same as that prevailing at the time the discriminatory acts took place and at the time the lawsuit was filed." *Id.* 22a-23a. Hence the majority opinion, written as if *Patterson* is still the law, produced "a result that is neither rational nor just." *Id.* 22a. Judge Cudahy also said that the statutory language supports a retroactive application, and that § 101 of the Act, defining "make and enforce contracts," amounts to a procedural change, providing an additional remedy for conduct already proscribed by Title VII, rather than a substantive change, and therefore falls within the *Thorpe-Bradley* rule of retroactivity. *Id.* 23a-24a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE DIFFERENCE BETWEEN THE *THORPE-BRADLEY* AND *BOWEN* APPROACHES TO APPLYING NEW LAWS TO PENDING CASES.

The court of appeals was quite correct in perceiving an inconsistency between the *Thorpe-Bradley* rule presuming that new statutes are to be applied to pending cases, absent manifest injustice, and the *Bowen* rule that statutes "will not be construed to have retroactive effect unless their language requires this result." This Court in *Bonjorno* acknowledged an "apparent tension" between the two lines of cases, 494 U.S. at 837, and Justice Scalia, concurring, found them "in irreconcilable contradiction," *id.* at 841. Several courts of appeals have echoed that view in a number of different contexts. See *Luddington* v. *Indiana Bell Tel Co.*, 59 Fair Empl. Prac. Cas. (BNA) 18, 19 (7th Cir. June 15, 1992) (Posner, J.), *petition for rehearing filed* (7th Cir. July 13, 1992) (1991 Civil Rights Act) ("'in irreconcilable contradiction,'"); *Simmons* v. *Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991) (Anti-Drug Abuse Act of 1988) ("irreconcilable conflict"); *Arnold* v. *Maynard*, 942 F.2d 761, 762 n.2 (10th Cir. 1991) (Judicial Improvements Act of 1990) ("irreconcilable Court positions"); *United States* v. *Peppertree Apartments*, 942 F.2d 1555, 1561 n.3 (11th Cir. 1991) (National Housing Act). ("confusion"), *vacated and remanded to district court on other grounds sub nom. Bailes* v. *United States*, 112 S. Ct. 1755 (1992); *Criger* v. *Becton*, 902 F.2d 1348, 1353 (8th Cir. 1990) (National Flood Insurance Act of 1968) ("confusion").

The tension between the two lines of authority has caused a muddle in the lower courts, as a brief catalogue will show.

The Eighth and Federal Circuits have elected to follow *Bowen* rather than *Bradley* in general. *Simmons* v. *Lock-*

hart, 931 F.2d 1226, 1230 (8th Cir. 1991) ("[O]ne must choose between the *Bradley* and [*Bowen*] presumptions. The better rule is [*Bowen.*]"); *Fray* v. *The Omaha World Herald Co.*, 960 F.2d 1370, 1375 (8th Cir. 1992) (adopting *Simmons*), *petition for rehearing filed* (8th Cir. Apr. 27, 1992); *Sargisson* v. *United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990) (choosing *Bowen*).[5]

In contrast, the Eleventh Circuit has consistently relied on *Bradley* since *Bowen*. See, *e.g.*, *FDIC* v. *232, Inc.*, 920 F.2d 815, 818 n.4 (11th Cir. 1991) (FIRREA) (citing other Eleventh Circuit cases); *Lussier* v. *Dugger*, 904 F.2d 661, 665-66 (11th Cir. 1990) (Civil Rights Restoration Act of 1987).

The District of Columbia Circuit leans towards *Bowen*. *Alpo Petfoods, Inc.* v. *Ralston Purina Co.*, 913 F.2d 958, 963 n.6 (D.C. Cir. 1990) (Lanham Act) ("Because the [*Bowen*] rule seems more faithful to the older decisions that are being interpreted in the retroactivity debate, [citation omitted], we rely on that rule here.").

Other circuits have relied on the pre-*Bowen* statement in *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), that statutes affecting substantive rights should apply prospectively only, rather than embracing *Bowen* across the board, and some continue to apply *Bradley* to non-substantive changes.

The Fifth Circuit cited *Bennett* to support its ruling that § 101 of the Civil Rights Act of 1991 affects substantive rights and should not be applied to conduct predating the amended statute's passage, thus suggesting that *Bradley* would still apply to non-substantive changes.

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[5] The Eighth Circuit's adoption of *Bowen* is very recent. Previously it had relied consistently on *Bradley* to apply the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") to pre-existing claims; and it recently applied *Bradley*'s manifest injustice test in *Bess* v. *Bess*, 929 F.2d 1332, 1334 n.2 (8th Cir. 1991), and found the result in harmony with *Bowen*.

Johnson v. *Uncle Ben's Inc.*, No. 91-2590, 1992 WL 147678 at *10-11 (5th Cir. July 1, 1992).

The Sixth Circuit has stated that *Bradley* provides a "relatively narrow exception to the general 'principle that statutes operate only prospectively,'" applying the *Bennett* principle that statutes affecting substantive rights should apply prospectively only. *Boddie* v. *American Broadcasting Cos., Inc.*, 881 F.2d 267, 269-70 (6th Cir. 1989) (Omnibus Crime Control and Safe Streets Act).

The First Circuit relied on *Bradley* to apply to a pending case a statute that "does not in any way alter substantive rights," suggesting that *Bennett* would require prospective application for a substantive change. *Demars* v. *First Serv. Bank for Sav.*, 907 F.2d 1237, 1240 (1st Cir. 1990) (FIRREA).

Similarly, the Ninth Circuit, which has applied both *Bowen* and *Bradley* on different occasions, recently ruled that *Bradley*'s presumption of retroactivity applies to a procedural change because "it does not affect substantive rights," thus apparently acknowledging that a statute affecting substantive rights applies prospectively only. *FDIC* v. *New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991) (FIRREA).

The Tenth Circuit's position is unclear. It chose *Bowen* in *DeVargas* v. *Mason & Hanger-Silas Mason Co., Inc.*, where it stated it was "[f]orced to elect between [the] contradictory presumptions." 911 F.2d 1377, 1390 (10th Cir. 1990) (Civil Rights Restoration Act of 1987). Yet, in *Arnold* v. *Maynard, supra*, noting that *DeVargas* dealt with a statute "affecting substantive rights and liabilities," the court stated that "[t]he presumption has always been to the contrary with respect to statutes that address matters of procedure and jurisdiction." 942 F.2d 761, 762 n.2 (10th Cir. 1991). Lower courts in the Tenth Circuit, however, have continued to cite *DeVargas* on the

retroactive applicability of provisions that do not clearly affect substantive rights.[6]

The approaches in the Second, Third, and Fourth Circuits are even more difficult to categorize. The Second Circuit recently acknowledged *Bowen*, ignored *Bradley*, and applied a five-factor test that focusses on detrimental reliance. *Lehman* v. *Burnley*, 866 F.2d 33, 38 (2d Cir. 1989) (Recreational Boating Safety Act). The Fourth Circuit relied on *Bowen* to apply an amendment to the National Flood Insurance Act prospectively, but noted that it would have reached the same result under *Bradley*. *Leland* v. *Federal Ins. Adm'r*, 934 F.2d 524, 528-29 (4th Cir. 1991). And in the Third Circuit, compare *United States Healthcare, Inc.* v. *Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922 n.9 (3d Cir. 1990) (amendment to the Lanham Act applies to pending cases under *Bradley*, with no citation to *Bowen* or *Bennett*), with *Davis* v. *Omitowoju*, 883 F.2d 1155, 1170-71 (3d Cir. 1989) (applying statutory amendment capping damages prospectively only because "the rights and obligations of the parties in this case were predicated upon [the old statute];" no reference to *Bradley*).

The Seventh Circuit's decisions in the last two years are themselves inconsistent. In *FDIC* v. *Wright*, 942 F.2d 1089, 1095 n.6, 1096-97 (7th Cir. 1991), the court applied *Bradley* to hold that FIRREA applies to pending cases and stated that "[a]ny tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights." The case at bar, as we have seen, held that *Bowen* states the rule for all substantive statutory amendments at any point in a proceeding and for changes in trial procedural rules on appeal. However, the court left

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[6] See, *e.g.*, *Donaldson* v. *Brady*, Civ. A. No. 91-A-1841, 1992 WL 119497 (D. Colo. May 14, 1992) (§ 102 of the Civil Rights Act of 1991).

open the possibility that *Bradley* might govern in deciding whether new damage provisions apply on appeal or if damage and procedural changes apply in a "new proceeding." Pet. App. 18a-20a. Yet one month later, another Seventh Circuit panel, announcing that *Bradley* and *Bowen* are in "irreconcilable conflict," embraced *Bowen* and ignored *Mozee*'s distinctions. *Luddington*, 59 Fair Empl. Prac. Cas. (BNA) 18 (7th Cir. June 15, 1992), *petition for rehearing filed* (7th Cir. July 13, 1992).

Still another distinction appears in some circuits. The Second, Fifth, and Eleventh Circuits have applied a specialized rule of *Bradley* to apply retroactively a law perceived to have been enacted in response to, and to correct, judicial construction of a statute. In a context markedly similar to this case, these courts applied this rule to find the Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a(2)(A) (1988), portions of which were enacted in response to *Grove City College* v. *Bell*, 465 U.S. 555 (1984), applicable to pending cases. See *Ayers* v. *Allain*, 893 F.2d 732, 754-55 (5th Cir.), *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990) (*en banc*), *vacated on other grounds sub nom. United States* v. *Fordice*, 60 U.S.L.W. 4769 (U.S. June 26, 1992); *Lussier* v. *Dugger*, 904 F.2d 661, 664-66 (11th Cir. 1990); *Leake* v. *Long Island Jewish Medical Center*, 695 F. Supp. 1414, 1417-18 (E.D.N.Y. 1988), *aff'd*, 869 F.2d 130 (2d Cir. 1989) (per curiam).[7] Contra *DeVargas* v. *Mason &*

[7] See *also Mrs. W.* v. *Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (Handicapped Children's Protection Act of 1986, enacted in response to *Smith* v. *Robinson*, 468 U.S. 992 (1984), applies to pre-existing claims); *Louviere* v. *Marathon Oil Co.*, 755 F.2d 428, 429 (5th Cir. 1985) (per curiam) (1984 amendments to Longshoremen's and Harbor Workers' Compensation Act "negat[ing]" *Washington Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925 (1984), apply retroactively); *Bonner* v. *Arizona Dep't of Corrections*, 714 F. Supp. 420, 422 (D. Ariz. 1989) (Civil Rights Restoration Act of 1987 applies to pre-existing claims).

Hanger-Silas Mason Co., 911 F.2d 1377, 1387 (10th Cir. 1990) (rejecting *Ayers*).

In sum, "[r]etroactivity analysis has become unusually complex in the absence of affirmative guidance from the United States Supreme Court[.]" *Dababneh* v. *FDIC*, No. 88-1272, 1992 WL 82099 at *7 n.8 (10th Cir. Apr. 27, 1992). The courts of appeals are not supposed to decide whether one of this Court's decisions overrules another, *Rodriquez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), and they have been unable to reach a consensus on how to reconcile *Thorpe-Bradley* and *Bowen*.

II. THE COURT SHOULD RESOLVE THE DIFFERENT APPROACHES IN THE LOWER COURTS IN APPLYING THE CIVIL RIGHTS ACT OF 1991 TO PENDING CASES.

The unsettled state of the law has affected the decisions regarding the application of the Civil Rights Act of 1991 to pending claims. As we have seen, the Seventh Circuit in this case held that new substantive provisions of the Act—including § 101—may not be applied in any pending case; held that courts of appeals may not apply new "trial procedural" provisions of the Act—including § 105—to cases pending on appeal; left undecided whether courts of appeals could apply the new damages provisions of § 102 to cases pending on appeal; and acknowledged that it may be proper for district courts to apply new procedural and damage provisions to pending cases where "new proceedings" will be held, although it found that no "new proceeding" will occur in this case after remand. Subsequently, however, the Seventh Circuit announced a different rule: that the new Act in general "is applicable only to conduct engaged in after the effective date, at least if the suit had been brought before the effective date." *Luddington* v. *Indiana Bell Tel. Co.*, 59 Fair Empl. Prac. Cas. (BNA) at 21, *petition for rehearing filed* (7th Cir. July 13, 1992). That rule, unlike the

rulings in this case, would preclude application of procedural or remedial provisions such as the damage and jury trial issues of new § 102 even to a case that had not yet gone to trial.

Three other circuits have ruled on the 1991 Act to date —the Fifth, Sixth, and Eighth. The Eighth Circuit has adopted *Bowen* as the preferred rule, applying every provision prospectively whether it is remedial or substantive. *Fray* v. *The Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992) (§ 101 applies prospectively under *Bowen*), *petition for rehearing filed* (8th Cir. Apr. 27, 1992). Judge Heaney dissented on the ground that the court's role is not to choose between conflicting precedents, but to reconcile them. See also *Huey* v. *Sullivan*, 58 Fair Empl. Prac. Cas. (BNA) 1472 (8th Cir. May 21, 1992) (§ 114, a remedial provision granting interest on Title VII awards to federal employees, applies only prospectively under *Bowen*). This approach differs substantially from that of *Mozee* and is broader than the rule set out in *Luddington*.[8]

In *Vogel* v. *City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992), *petition for certiorari filed on other grounds*, 60 U.S.L.W. 3881 (U.S. June 11, 1992) (No. 91-2001), the Sixth Circuit concluded without discussion that the damages provisions of § 102 of the Act should not apply to a pre-existing claim because "[c]learly, retroactive application of the 1991 Act would affect 'substantive rights and liabilities[.]'" *Vogel* does not make clear whether the court views the damages provisions of § 102 in particular as affecting substantive rights (unlike *Mozee*), or whether (like *Luddington*) it believes that *all* provisions of the Act must apply prospectively because some provisions are substantive.

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[8] The Eighth Circuit heard argument *en banc* on July 21, 1992, in another case presenting the question whether § 101 applies prospectively only. *Hicks* v. *Brown Group, Inc.*, 946 F.2d 1344 (8th Cir. 1991), *vacated and remanded*, 112 S. Ct. 1255 (1992).

The Fifth Circuit has ruled that § 101 does not apply to conduct that predates both the Act's enactment and *Patterson*, because § 101 "affects substantive antecedent rights." *Johnson* v. *Uncle Ben's Inc.*, No. 91-2590, 1992 WL 147678 at *10 (5th Cir. July 1, 1992).[9] This ruling is based on a narrower approach than *Luddington* or *Fray*.

District court decisions in those circuits that have not yet ruled on the retroactivity of the Act also reflect confusion and disarray. One court has relied on the restorative nature of the Act to hold that § 101 applies to pre-existing claims. *Stender* v. *Lucky Stores, Inc.*, 780 F. Supp. 1302, 1305-06 (N.D. Cal. 1992) (restorative rationale also applies to certain other sections). Other courts have expressed sympathy for this approach but ruled that § 102's damages provisions are not restorative, without addressing § 101.[10]

District courts in the Second, Third, and Fourth Circuits have used contradictory presumptions and reached contradictory results regarding the application of § 102 to pre-existing claims.[11] District courts in the Ninth and

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[9] The court ignored its earlier application of the Civil Rights Restoration Act of 1987 to pending claims in *Ayers*. See *supra* at 12.

[10] See, *e.g.*, *Reynolds* v. *Frank*, 786 F. Supp. 168, 170 (D. Conn. 1992) ("[r]etroactivity is more reasonably inferred when legislation restores protections eroded by the courts than when the legislation provides additional protections").

[11] In the Second Circuit compare *Smith* v. *Petra Cablevision Corp.*, No. CV-88-2091, 1992 WL 108356 (E.D.N.Y. May 20, 1992) (applying *Bowen* as the "better reasoned and supported decision" to rule against retroactive application of §§ 101 and 102), and *Kemp* v. *Flygt Corp.*, to be published at 791 F. Supp. 48 (D. Conn. 1992) (applying *Bowen*), with *Jackson* v. *Bankers Trust Co.*, 58 Empl. Prac. Dec. (CCH) ¶ 41,474 (S.D.N.Y. May 4, 1992) (applying *Bradley* to rule that the § 102 damages provisions apply to pre-

Eleventh Circuits have followed *Bradley* to apply § 102 to pending cases, and to apply § 101 prospectively only.[12] District courts in the Tenth Circuit have consistently applied *Bowen*.[13] The district court of the District of Columbia found § 102 inapplicable to a pending federal employee case,[14] but applicable to a pending private employee case.[15] Most of these circuits have cases pending

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existing claims), and *Croce* v. *V.I.P. Real Estate, Inc.*, 786 F. Supp. 1141 (E.D.N.Y. 1992) (same).

In the Third Circuit compare *Sample* v. *Keystone Carbon Co.*, 786 F. Supp. 527 (W.D. Pa. 1992) (applying *Bradley* and ruling that § 102's damages provisions apply to pending cases because they are remedial), with *Crumley* v. *Delaware State College*, Nos. Civ. A. 90-429, 90-711, 91-89, 92-25, 1992 WL 142243 (D. Del. June 11, 1992) (applying *Bradley* and ruling that § 102's damages provisions apply prospectively because they are substantive), and *Haynes* v. *Glen Mills Schools*, Civ. No. 91-6905, 1992 WL 97904 (E.D. Pa. May 6, 1992) (citing *Vogel* and *Fray* to rule that § 102 applies prospectively).

In the Fourth Circuit compare *Jaekel* v. *Equifax Marketing Decisions Systems, Inc.*, Civ. No. 92-607-A, 1992 U.S. Dist. LEXIS 9489 (E.D. Va. June 26, 1992) (applying § 102 to pre-existing claims because it does not affect substantive liabilities or vested rights), with *McCormick* v. *Consolidation Coal Co.*, 786 F. Supp. 563 (N.D. W. Va. 1992) (adopting *Bowen* as the "most current" law to rule § 102 applies prospectively).

[12] See, *e.g.*, *Sussman* v. *Saxon*, 59 Fair Empl. Prac. Cas. (BNA) 143 (M.D. Fla. May 29, 1992) (§ 102 is remedial and applies to cases pending at Act's enactment); *Lee* v. *Sullivan*, 787 F. Supp. 921 (N.D. Cal. 1992) (applying § 102 to pre-existing claims); *United States* v. *Dep't of Mental Health*, 785 F. Supp. 846 (E.D. Cal. 1992) (same); *Toney* v. *State of Ala.*, 784 F. Supp. 1542 (M.D. Ala. 1992) (applying *Bradley* to rule that § 101 does not apply to pre-enactment conduct).

[13] See, *e.g.*, *Donaldson* v. *Brady*, Civ. No. A 91-A-1841, 1992 WL 119497 (D. Colo. May 14, 1992) (relying on *DeVargas* to apply *Bowen* and deny retroactive application of § 102).

[14] *Van Meter* v. *Barr*, 778 F. Supp. 83 (D.D.C. 1991), *interlocutory appeal permitted*, No. 92-5046 (D.C. Cir. Feb. 19, 1992).

[15] *Robinson* v. *Davis Memorial Goodwill Indus.*, 58 Fair Empl. Prac. Cas. (BNA) 1084 (to be published at 790 F. Supp. 325)

on appeal concerning the applicability of §§ 101 or 102 to pending cases.

In short, the disarray that marks retroactivity decisions generally has affected the approaches that courts take in applying the Civil Rights Act of 1991. The courts of appeals have taken different approaches and district courts have reached differing results. The confusion will only end with a decision by this Court.

In the meantime, the confused state of the law creates an atmosphere of doubt and unpredictability. Plaintiffs cannot be sure of their rights. Defendants cannot be sure of potential liabilities. So long as the law remains in disarray the federal courts will continue to expend their limited resources seeking to reconcile or chose between this Court's apparently conflicting approaches.

The element of detrimental reliance, either as a determinant or as a factor to be considered, has played a significant role in several appellate rulings. See *supra* at 6, 7, 9-13. It appears relevant to this Court's rulings as well. See, *e.g.*, *Bennett*, 470 U.S. at 639 (prospective application warranted when new statutes work a change in substantive law). See also *Bonjorno*, 494 U.S. at 854-57 (Scalia, J., concurring). The case at bar provides a suitable vehicle for considering the role of reliance in retroactivity analysis, where Congress has responded to decisions of this Court and attempted to restore prior law.

III. THE DECISION BELOW IS WRONG.

The court of appeals erred in holding that § 101 of the Act does not require reinstatement of rulings in Petitioners' favor on liability under § 1981 and in holding that none of the procedural or damage provisions of the

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(D.D.C. 1992) (under *Bowen* and *Bradley*, "presumption of retroactivity is only applicable when a statute does not operate to deprive a party of a vested or matured right[;]" therefore, § 102, which is remedial or procedural, applies to pre-existing claims).

Act will apply in the subsequent proceedings in district court.

First, the court incorrectly applied the *Bennett* proposition that "statutory provisions impacting substantive rights and obligations will not be retroactively applied." As Judge Cudahy stated in dissent, § 101 of the Act, which amends § 1981 by defining "make and enforce contracts" to comport with pre-*Patterson* law, does not alter substantive obligations. Pet. App. 23a. Instead, § 101 codifies as illegal under § 1981 conduct that Title VII has always proscribed. Thus, in effect, the amendment to § 1981 merely assures a right to a jury trial and compensatory and punitive damages to plaintiffs who already had more limited remedies for the same conduct under Title VII. Such a change does not alter the substantive obligations on the part of employers that the statutes seek to enforce.

Second, the court of appeals failed to take account of § 101's manifest purpose and effect, which were to restore the law of § 1981 to where it had been, by consensus of the circuits, before the *Patterson* decision in 1989. Petitioners' charges against Respondent are based on Respondent's conduct in the 1970s. It was not until years later—in the period leading up to *Patterson*—that any serious question arose about whether § 1981 separately prohibited and provided remedies for the same conduct. Thus, neither Respondent's nor Petitioners' conduct would have differed had the Civil Rights Act of 1991 been in effect in the 1970s. As a result, even assuming that some employers rely on the penalty-scheme of existing law to conform their conduct and "that it is unfair to hold private parties accountable for rules which were not in effect at the time in which the parties' relevant conduct took place," Pet. App. 13a-14a, citing *Bonjorno*, 494 U.S. at 855 (Scalia, J., concurring), no such unfairness is present in cases like this one.

Third, the court erred in holding that none of the damage provisions of the new Act—including those of § 102—

should apply on remand. The district court will need to make additional findings on whether Respondent is liable under Title VII for discrimination in its disciplinary practices and to hold proceedings on back pay, among other things, for members of the Title VII class. There would be no disruption or duplication in allowing those class members to recover the additional compensatory or punitive damages allowed by § 102. Although the court of appeals assumed that these provisions might apply when a trial court "initiates an entirely new proceeding," Pet. App. 19a, it held that it would be "inequitable and confusing" to allow class members the same rights in this case because some of the trial court's Title VII liability rulings were affirmed by the court of appeals. *Id.* 21a. The court's conclusion is inexplicable.

Fourth, the court erred in ruling that on remand Petitioners would not have the benefit of the procedural provisions of § 105 of the Act, which restored the law on burdens of proof in disparate impact cases to its pre-*Wards Cove* state. Again, the court assumed that "in new proceedings" in district court a plaintiff would have the benefit of such procedural provisions, but found it "inequitable and confusing" to give Petitioners those rights on remand because "the remanded Title VII claims would be governed by different law than those [Title VII] claims which were affirmed [on interlocutory appeal]." Pet. App. 21a. To the contrary, the only remaining liability issue could be resolved on remand under § 105 without confusion, and there would be nothing "inequitable" about applying those new procedural rules on remand.

Fifth, there is no justification for the court's disinclination "to require a trial court to conduct a provision-by-provision analysis of an act in order to distinguish between those provisions regulating procedure and damages and those provisions that affect substantive rights and obligations." Pet. App. 21a. The Civil Rights Act of 1991 is an important statute with many different,

entirely unrelated provisions. If Congress failed to specify the retroactive effect of each and every provision, courts have the obligation to do so because they are faced with two potentially applicable statutes—the old and the new. That responsibility cannot be avoided even if onerous.

Finally, the ruling below—and each of the other circuit court rulings on the applicability of the new Act—is wrong because the plain language of the statute answers the retroactivity question. Section 402(a) provides: "Except as other specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." While that provision, standing alone, might not resolve the issue, two other specific provisions of the Act are superfluous unless the Act is generally applicable to pending cases. First, § 402(b) provides:

> "Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."

The legislative history makes clear that this provision was added—after enactment of the other provisions—to ensure that the new Act did not apply to the *Wards Cove* case. 137 Cong. Rec. S15953-54 (daily ed. Nov. 5, 1991) (statement of Sen. Murkowski). It was entirely unnecessary unless the Act was generally applicable to pending cases. Second, in § 109(c), Congress expressly provided that the amendments made by § 109 (governing extraterritorial effect of Title VII) "shall not apply with respect to conduct occurring before the date of the enactment of this Act." This provision also was unnecessary unless the Act was generally applicable to pending cases.[16]

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[16] Although the courts of appeals have found the statutory language inconclusive, several district courts accepted the argument set forth here. See, *e.g.*, *Langston* v. *Daniels, Micheals & Assoc.*,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 1992

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59 Fair Empl. Prac. Cas. (BNA) 56, 58 (N.D. Ala. June 4, 1992) (§ 102); *Tarver* v. *Functional Living, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 134 (W.D. Tex. June 8, 1992); *Sussman* v. *Saxon*, 59 Fair Empl. Prac. Cas. (BNA) 143 (M.D. Fla. May 29, 1992); *Robinson* v. *Davis Memorial Goodwill Indus.*, 58 Fair Empl. Prac. Cas. (BNA) 1084 (to be published at 790 F. Supp. 325) (D.D.C. 1992); *Stender* v. *Lucky Stores, Inc.*, 780 F. Supp. 1302, 1303-04 (N.D. Cal. 1992).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 90-2660

WILLIAM O. MOZEE, GREGORY L. RANKIN, FREDERICK WILLIAMS, *et al.*,
Plaintiffs-Appellees,

v.

AMERICAN COMMERCIAL MARINE SERVICE COMPANY,
Defendant-Appellant.

On Petition[s] for Rehearing

Decided May 7, 1992

Clarified May 18, 1992

Mark W. Ford (Johnson, Smith, Densborn, Wright & Heath), Indianapolis, Ind. (Ronald E. Elberger, Mark R. Waterfill, and Bose, McKinney & Evans, Indianapolis, Ind., Samuel G. Hayward, Levin & Hayward, Louisville, Ky., and Jerry Ulrich, New Albany, Ind., with him on brief), for appellees.

James S. Whitehead, (Sidley & Austin), Chicago, Ill. (John K. Gordinier, Michael W. Lowe, Frank G. Simpson, III, and Pedley, Ross, Zielke, Gordinier & Porter, Louisville, Ky., and Lisa L. Fleming, Jeffersonville, Ind., with him on brief), for appellant.

Before WOOD,* CUDAHY, and FLAUM, Circuit Judges.

* * * *

HARLINGTON WOOD, Jr., Circuit Judge:—The Civil Rights Act of 1991, which furthers the protections against discrimination and harassment in the workplace, is undoubtedly an important step in protecting civil liberties. *See* Civil Rights Act of 1991, Pub. L. No. 102-166; § 102, 105 Stat. 1071 (U.S.C.S., Adv. Legis. Serv., Lawyers Coop. Pub. Co.). Today this court is faced with the difficult task of deciphering to what extent the Civil Rights Act of 1991 is applicable to this case which was pending on appeal during its enactment.

I.

BACKGROUND

This case was first filed in 1977. In *Mozee v. Jeffboat, Inc.*, 746 F.2d 365 [35 FEP Cases 1810] (7th Cir. 1984) ("*Mozee I*"), we reversed a district court decision because the actual findings "were insufficient to permit meaningful appellate review." *Mozee I*, 746 F.2d at 367. Afterward, the district court issued several opinions on liability. In *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036 [56 FEP Cases 1155] (7th Cir. 1991) ("*Mozee II*"), this court accepted an interlocutory appeal in which defendant American Commercial Marine Service Company, Jeffboat Division ("*Jeffboat*"), contested liability findings in a civil rights suit brought under Title VII and Section 1981 of the 1964 Civil Rights Act.

This court issued *Mozee II* on August 14, 1991. In that decision we reversed both the individual plaintiffs' and the class-wide claims under Section 1981; we affirmed the plaintiffs' individual claims for violation of Title VII; we affirmed the class-wide Title VII claims

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* Judge Wood, Jr. assumed senior status on January 16, 1992, which was after consideration of this case.

based on Jeffboat's promotion practices and we vacated and remanded the trial court's determinations with regard to the class-wide Title VII claims based on Jeffboat's discipline instructions. *Mozee II*, 940 F.2d at 1055.

On August 27, 1991, Jeffboat filed a petition for rehearing, and on August 28, 1991, the plaintiffs filed a petition for rehearing. While these petitions for rehearing were pending before this court Congress passed the Civil Rights Act of 1991 ("1991 Civil Rights Act" or "1991 Act"). We asked the parties to file supplemental briefs discussing the possible applicability of the 1991 Civil Rights Act to this case. The plaintiffs filed their supplemental reply brief, the last of the supplemental briefs, on January 2, 1992. This supplemental decision discusses the extent to which the 1991 Civil Rights Act applies to the parties before this court.

The question of retroactivity in this case is two-fold. Our first level of inquiry is whether the 1991 Act applies in a manner that will change our decision in *Mozee II*. In other words, the first question is whether the 1991 Act applies retroactively on appeal.

The plaintiffs point to the following provisions of the 1991 Civil Rights Act as potentially applicable to this case: (1) Section 101(b), which expands the definition of what constitutes the making and enforcement of a contract for section 1981 claims; (2) Sections 104 and 105, which pertain to the business necessity defense for disparate impact cases under Title VII; (3) Section 102, which makes compensatory and punitive damages available for intentional discrimination claims under Title VII; (4) Section 102(c), which pertains to the availability of a jury trial under Title VII.[1] *See* Pub. L. No. 102-166; 105 Stat. 1071.

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[1] Plaintiffs in their supplemental brief, however, seem to have conceded that their earlier waiver of a jury trial under Section 1981 also constitutes a waiver of this newly enacted jury trial provision.

For the reasons explained below, we hold that the provisions of the 1991 Act apply prospectively on appeal. Likewise, the district court should not apply the 1991 Civil Rights Act when considering the issues remanded in *Mozee II*.

II.

ANALYSIS

A. *Congressional Intent*

When congressional intent is clear as to the issue of prospective versus retroactive application, then this intent controls. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990). However, whether Congress intended prospective or retroactive application of the 1991 Civil Rights Act cannot be deciphered from either the language of the statute or from the legislative history.

Numerous courts have addressed the issue of whether the 1991 Civil Rights Act applies retroactively to pending cases. The courts have various views on the issue of legislative intent. *For example, compare Fray v. The Omaha World Herald Co.*, Nos. 91-2439, 91-2443, 91-2731, 1992 U.S. App. LEXIS 6060, *25 [58 FEP Cases 786] (8th Cir. April 3, 1992) (legislative history indicates an intent to apply the Act prospectively); *Vogel v. Cincinnati*, No. 91-3474, 1992 U.S. App. LEXIS 4226, *8 [959 F.2d 594, 58 FEP Cases 402] (6th Cir. Mar. 13, 1992) (no clear legislative intent can be deciphered from the statutory language or legislative history); *High v. Broadway Ind., Inc.*, 1992 U.S. Dist. LEXIS 446 *1 [57 FEP Cases 1159]; (W.D. Mo. Jan. 7, 1992) (same); *Hansel v. Public Serv. Co.*, 778 F.Supp. 1126, 1136 [57 FEP Cases 585] (D. Colo. 1991 (same); *Stender v. Lucky Stores, Inc.*, 1992 WL 2904, *2 [780 F.Supp. 1302, 57 FEP Cases 1445] (N.D. Cal. Jan. 7, 1992) (statute's language evinces a legislative intent to apply the 1991 Civil Rights Act retroactively to pending cases); *Stevens v. Mann*, 57 Fair Emp. Prac. Cas. 1290, 1291 (N.D. Tex. 1992) (1991 Civil

Rights Act's language and legislative history indicate a congressional intent not to retroactively apply its provisions). Even in the face of these divergent opinions with regard to whether the language or the legislative history indicates a clear intent on this issue, both the plaintiffs and Jeffboat argue the legislative intent is clear, and, of course, both offer diametrically opposed interpretations of this so-called "clear" legislative intent.

President Bush signed the 1991 Civil Rights Act into law on November 21, 1991. Section 402(a) of the 1991 Civil Rights Act provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Pub. L. No. 102-166, § 402(a), 105 Stat. 1071. The fact that the 1991 Act becomes effective on the date of enactment provides no guidance as to whether the Act applies to pending cases. Indeed, this clause is susceptible to several interpretations: it might mean that the 1991 Act applies to conduct which occurred after the enactment, it might mean that the Act applies to cases filed after the enactment, it might mean that the Act applies to all proceedings beginning after the enactment, it might mean that the Act's provisions apply to all pending cases at any stage of the proceedings or it might mean that the Act's procedural provisions apply to proceedings begun after enactment and the substantive provisions apply to conduct that occurs after the enactment. Considering this array of possible interpretations, Section 402(a) provides no guidance as to whether Congress intended the Act to apply prospectively or retroactively to cases pending on appeal or cases remanded to the district court.

The plaintiffs argue, however, that the 1991 Act as a whole indicates that Congress intended a retroactive application of the statute. As support for this argument the plaintiffs point to Section 402(b) of the Act, which states, "Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1,

1975, and for which an initial decision was rendered after October 30, 1983." Pub. L. No. 102-166, § 402(b), 105 Stat. 1071. Plaintiffs argue that because this provision specifically excepts a special category of cases from retroactive application, this implies that Congress intended the remainder of the Act to apply retroactively. However, it is fairly clear from the legislative history that this exception was placed in the statute to ensure that the Act's provisions would not apply to the parties in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 [49 FEP Cases 1519] (1989), a disparate impact case in litigation for approximately twenty-five years.[2] Therefore, Section 402(b) is nothing more than a clear assurance that courts would not apply the 1991 Act to the *Wards Cove* litigation regardless of how the courts might eventually construe the 1991 Act's applicability to pending cases.

Plaintiffs also point to Section 109(c) which specifically states that the section's provisions "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Pub. L. No. 102-166, § 109(c), 105 Stat. 1071. Again, however, this language can be interpreted as an extra assurance that this Section's provisions will only apply to post-enactment conduct regardless of how the court eventually applies the Act's other provisions. In other words, Congress may have intended and envisioned that under the then-current judicial precedent courts would construe the Act in a manner that would require only a prospective application, but Congress, realizing that court interpretation may change over time, may have wanted to ensure that judicial interpretation would not alter the prospective application of the Act in these two circumstances.

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[2] *See* 137 Cong. Rec. S 15478 (daily ed. Oct. 30, 1991) (statement of Senator Dole) ("At the request of the Senators from Alaska, section [402(b)] specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.").

In sum, Section 402(a)'s language is hopelessly ambiguous as to the issue of whether Congress intended the 1991 Civil Rights Act to apply retroactively to pending cases. And, although Sections 402(b) and 109(c) are explicitly prospective, the language is not sufficiently probative of congressional intent to suggest that Congress intended a retroactive application of the remainder of the Act. Consequently, we cannot divine from the Act's language whether Congress intended the Act to apply retroactively to pending cases.

Jeffboat contends, however, that the legislative history indicates a clear congressional intent not to apply the Act retroactively to pending cases. As support for this argument, Jeffboat first points to the differing language in the 1991 Civil Rights Act and the vetoed 1990 Civil Rights proposal. The 1990 proposal contains explicit language that would have required courts to apply many of its provisions to cases pending at the time of its enactment. S. 2104, § 15(a), 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H. 9554 (daily ed. Oct. 12, 1990). As Jeffboat argues in its supplemental brief, the fact that Congress failed to include this explicit language in the 1991 Civil Rights Act, arguably indicates that Congress intended a prospective application of the 1991 Act. However, this argument is negated by the fact that Congress did not adopt the Bush Administration's proposed bill which, in contrast, contained explicitly prospective language.[3]

Jeffboat also points to statements of several members of Congress in order to bolster its argument that the legislative history indicates a clear congressional intent to

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[3] Section 14 of the Bush proposal provides:

> This Act and the amendments made by this Act shall take effect upon enactment. The amendments made by this Act shall not apply to any claim arising before the effective date of this Act.

H.R. 1375, 102nd Cong., 1st Sess. (1991).

prospectively apply the Act, not to retroactively apply the Act to pending cases. It is difficult to decipher congressional intent from the statements of different members of Congress. Each member of Congress may vote on a piece of legislation for a different reason, and each may anticipate that the courts will construe the statute's language in a different manner. *Perera v. Siegel Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992). As such, it is often difficult to decipher one uniform intent from such isolated statements. This difficulty in deciphering intent from legislative history is evident in this case because, as the plaintiffs have correctly indicated, the legislative history contains statements that both favor and disfavor the retroactive application of the 1991 Civil Rights Act to pending cases. One such example of contradictory statements of intent can be seen by comparing Senator Kennedy's indication that the 1991 Civil Rights Act would be retroactively applied to pending cases under judicial precedent, 137 Cong. Rec. S 15485 (daily ed. Oct. 30, 1991) to Senator Danforth's indication that the Act would be prospectively applied under Supreme Court precedent, *id.* at S 15483.

A clear indication of congressional intent cannot be deciphered from the legislative history or the 1991 Act's language. Without a clear indication of congressional intent in either the language of the 1991 Civil Rights Act or in the Act's legislative history, we must turn to judicially derived rules of construction in order to resolve this ambiguity.

B. *Resolving Conflicting Supreme Court Precedent*

The Supreme Court, until its 1968 decision in *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1968), followed the general presumption that statutes were to apply prospectively unless the statute expressly provided otherwise. *See Bonjorno*, 494 U.S. at 842 (Scalia, J., concurring). However, in *Thorpe* the

Supreme Court stated that the presumption runs the other way. *Thorpe*, 393 U.S. at 281. The *Thorpe* decision reached this conclusion without discussing its deviation from a long line of precedent. *See Bonjorno*, 494 U.S. at 845 (Scalia, J., concurring). Then in 1974, the Supreme Court reaffirmed and, possibly, expanded *Thorpe* in *Bradley v. School Board*, 416 U.S. 696 (1974). In *Bradley* the Supreme Court stated that the general rule requires courts who are faced with new statutory provisions to apply the law at the time of the decision. *Bradley*, 416 U.S. at 711. Accordingly, *Bradley* retroactively applied a newly enacted statute regarding attorney fees.

Bradley, however, is not the Supreme Court's last statement on this issue. Instead, the Court has rendered numerous decisions since *Bradley*, some of which seem to rely on the *Thorpe-Bradley* presumption that statutes apply retroactively to pending cases and some of which state and rely on the historical presumption that statutes apply prospectively unless the statute expressly provides otherwise. Below are a few examples of the Supreme Court's varied post-*Bradley* opinions.

In *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), the Court stated, "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Security Industrial Bank*, 459 U.S. at 79. Then three years later in *Bennett v. New Jersey*, 470 U.S. 632 (1985), the Supreme Court based its analysis on the *Thorpe-Bradley* presumption of retroactive application, but then went on to hold that the facts in that case were excepted from the *Thorpe-Bradley* rule. *Bennett*, 470 U.S. at 638-40. Then in 1988 the Supreme Court again shifted gears in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bowen* the Supreme Court used strong language indicating that courts should generally presume that statutes apply prospectively; "Retroactivity is not favored in the law. Thus, congressional enactments

and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 208. Then in 1989, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 [4 IER Cases 246] (1989), the Supreme Court made a passing reference to *Thorpe* because *Thorpe* offered legal support for the parties' concession that newly enacted regulations applied in that case. *Von Raab*, 489 U.S. at 661-62, n.1.

Jeffboat argues that the Supreme Court's decision in *Bowen* indicates an intent to overrule the *Thorpe-Bradley* line of cases. We, on the other hand, conclude that rather than overruling the *Thorpe-Bradley* line of cases, the Supreme Court has left us with two seemingly contradictory lines of cases—a conclusion endorsed by the Court of Appeals for the Sixth and Eighth Circuits. *Vogel*, 1992 U.S. App. LEXIS at *7-8; *Fray*, 1992 U.S. App. LEXIS at *12-14. Moreover, several factors support this reading of Supreme Court precedent. First, the fact that *Von Raab*—a post-*Bowen* decision—relies on *Thorpe* strongly suggests that *Bowen* did not overrule the *Thorpe-Bradley* line of cases. Second, *Bowen* involved an agency's authority to promulgate rules with retroactive effect in the absence of express congressional authority. *Bowen*, 488 U.S. at 208. Therefore, *Bowen*, which did not even mention the *Thorpe-Bradley* rule, is not directly applicable to cases where courts are asked to decipher the prospective versus retroactive application of congressional statutes to pending cases. Third, the *Bonjorno* opinion indicates that the Court has not overruled the *Thorpe-Bradley* line of cases. In that case the majority opinion merely recognizes an "apparent tension" between these lines of cases. *Bonjorno*, 494 U.S. at 837. The majority did not attempt to reconcile this tension because it determined that the statute expressed a clear intent not to apply the relevant provision to judgments entered before its effective date. Justice Scalia, although joining in the majority's interpretation of statutory intent, wrote a concurrence where

he urged the Court to reconcile the conflicting lines of Supreme Court precedent by overruling the *Thorpe-Bradley* line of cases, *id.* at 841, whereas the four dissenting Justices seemed to rely on the *Thorpe-Bradley* rule in their analysis. *Id.* at 866-69. Apparently, Jeffboat would have us believe the fact that the Supreme Court overruled the *Thorpe-Bradley* line of cases escaped these four dissenting Justices in *Bonjorno* and the majority of the Court in *Von Raab*.

The Supreme Court emphasized in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), that it is not within the province of the court of appeals to determine when Supreme Court decisions in one line of cases effectively overrule Supreme Court decisions in another line of cases. *Rodriguez*, 490 U.S. at 484. Accordingly, we are left with the difficult task of reconciling the *Thorpe-Bradley* and *Bowen* lines of cases in a manner that comports with the policies underlying the need for prospective versus retroactive application.

In order to reconcile these cases we must first decide which line of cases embodies the general rule of construction and which line of cases has more limited applicability. Unfortunately, this court's opinions do not offer much guidance on this issue. *Compare Littlefield v. McGuffey*, 954 F.2d 1337, 1345 (7th Cir. 1992) (relying on *Bradley* to apply a statute removing the cap on punitive damages—this statute was enacted before the case went to trial); *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089, 1095-97 (7th Cir. 1991) (relied on *Bradley* when applying a statutory rule of estoppel which was enacted before trial); *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 735 (7th Cir. 1991) (relied on *Bowen* in refusing to retroactively apply a statute limiting the ability to prepay loans from the Department of Housing and Urban Development).

As Justice Scalia noted in his concurrence in *Bonjorno*, *Bowen's* presumption of prospective application is a rule

rooted in history and tradition. *Bonjorno*, 494 U.S. at 855 (Scalia, J., concurring). Moreover, Justice Scalia indicates that the presumption of prospective application is grounded in notions of fairness because parties should only be held accountable for the laws at the time of their conduct. *Id.* Considering that the *Bowen* presumption of prospective application is the historical rule of construction, and considering that the *Bowen* decision contains strong language reaffirming this historical rule of construction, we will assume that *Bowen* states the general rule. Therefore, we will only apply the *Thorpe-Bradley* presumption of retroactive application in a narrow category of cases.

The difficult issue now becomes what are the *narrow circumstances* in which the *Thorpe-Bradley* rule applies. The plaintiffs suggest that the *Thorpe-Bradley* rule should apply to cases pending on appeal and that *Bowen's* presumption of prospective application should apply to cases pending before the trial courts. However, such a distinction has no basis in policy. *See Bonjorno*, 494 U.S. at 854 (Scalia, J., concurring). In fact, such a distinction, if anything, seems backwards. It seems unlikely that the Supreme Court would require parties to comply with new laws on appeal which could possibly require an entirely new proceeding, but that parties at the earlier stages of litigation would not be bound by this new law. The doubtful nature of such a distinction is especially apparent in this case where the parties before this court have been in litigation for fifteen years. It seems remarkable that after fifteen years the parties before us would need to reinitiate proceedings under this new law, while other parties before the district court for only months would not be required to abide by such laws. Moreover, the application of such a distinction would be even more remarkable in this case because we would apply the new law to this interlocutory appeal, but the district court would apply the old law to the issues still pending before it. Clearly,

the *Thorpe-Bradley* line of cases must be reconciled on some other basis.

Bennett, a 1985 Supreme Court decision, sheds some light on the problem of reconciling these conflicting presumptions. In that case the Court refused to apply the *Thorpe-Bradley* line of cases and, instead, presumed prospective application. In reaching this conclusion, the Court indicated that the *Thorpe-Bradley* rule by its own terms does not apply when the retroactive application of a statute " 'would infringe upon or deprive a person of a right that had matured or become unconditional.' " *Bennett*, 470 U.S. at 639 (quoting *Bradley*, 416 U.S. at 720). The *Bennett* decision further indicates that its refusal to apply the *Bradley* presumption "comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett*, 470 U.S. at 639 (citing *Security Industrial Bank*, 459 U.S. at 79).

Bennett involved the application of a new rule that would affect New Jersey's need to repay federal grants. *Bennett*, 470 U.S. at 636. Therefore, the *Bennett* decision could be read narrowly to mean that the *Thorpe-Bradley* line of cases does not apply to statutory provisions that affect matured property-like interests. However, considering that the *Bowen* presumption of prospective application is the general rule, we conclude that *Bennett*, instead stands for the proposition that statutory provisions impacting substantive rights and obligations will not be retroactively applied.

Not only is this broad reading of *Bennett* more consistent with the Supreme Court's holding in *Bowen*, this reading of *Bennett* also seems to comport with the policies underlying the choices between retroactive and prospective application. As we stated above, one of the policies embodied in the need for prospective application is that it

is unfair to hold private parties accountable for rules which were not in effect at the time in which the parties' relevant conduct took place. *See Bonjorno*, 494 U.S. at 855 (Scalia, J., concurring). As such, the better and more fair rule is to hold parties accountable for only those acts that were in violation of the law at the time the acts were performed. *Bennett* assures that parties are accountable solely for the substantive law in effect at the time of their relevant conduct.

C. *Retroactive versus Prospective Application on Appeal*

The parties have pointed to several provisions of the 1991 Civil Rights Act which are potentially applicable to either the reevaluation of our appellate decision in *Mozee II* and or the remand of several of the district court's Title VII findings. Some of these provisions are apparently substantive provisions, some are apparently procedural provisions, and some are clearly damage provisions. *See* Pub. L. No. 102-166, §§ 101, 102, 104, 105, 105 Stat. 1071. Having determined that the *Bowen* presumption of prospective application will apply to substantive provisions at any stage of the proceeding, we now need to address whether this means by implication that the *Thorpe-Bradley* rule of retroactive application applies to these potentially applicable procedural and damage provisions. We first address the issue of whether *Thorpe-Bradley*'s presumption of retroactive application applies to procedural and damage provisions on appeal.

Granted, *Thorpe* involved the retroactive application of a procedural rule on appeal. Nevertheless, when looking at the policies underlying the general presumption of prospective application, we conclude that *Thorpe* does not require appellate courts to retroactively apply procedural provisions, as a general rule, on appeal. Instead, as we explain below, *Thorpe* involved unique circumstances. Therefore, the general rule is that the *Bowen* presumption of prospective application applies to procedural provisions on appeal.

The procedural right at stake in *Thorpe* was very different from a procedural right at stake in most trials. In *Thorpe* a local agency evicted a tenant in a federally assisted housing project. The local housing authority brought summary eviction proceedings without explanation and without providing the tenant any process. *Thorpe*, 393 U.S. at 269-71. While the case was on appeal, HUD promulgated a rule requiring local agencies to provide notice and an opportunity for explanation before eviction. The *Thorpe* Court held that the general presumption is that an appellate court applies the law at the time of decision. *Id.* at 281. Following this presumption, the *Thorpe* Court held that the HUD rule applied retroactively, and, therefore, the local agency had to give the process required by the rule.

In *Thorpe*, the Supreme Court merely forced a government agency to follow procedures after the Court recognized that some procedure was necessary to avoid constitutional due process problems. *Id.* at 283. Another very important distinction between retroactive application of the procedures in *Thorpe* and the retroactive application of procedural provisions in the 1991 Civil Rights Act on appeal is that in *Thorpe* there was no process given to the parties in the first instance. Therefore, in *Thorpe* the retroactive application of the rules did not require the agency to go through the expense of conducting two proceedings. That is, *Thorpe* did not involve a situation where the agency had to spend money redoing a procedure that had already been rendered. On the other hand, in cases like that before this court, where the parties have already litigated the issues on appeal, the retroactive application of a procedural provision could require a new trial and could, therefore, require double expenses. It appears that in most appeals such a retrial would rise to the level of manifest injustice, thereby rendering the *Thorpe-Bradley* rule inapplicable. *See Bradley*, 416 U.S. at 716 (courts should not apply a statute retroactively

if such an application will result in manifest injustice). This injustice is particularly apparent in a case such as the one before us today where the parties have been in litigation for fifteen years. Accordingly, we conclude that the general rule of *Bowen* applies when a statute changes the trial procedural rules once the matter is on appeal.

Bradley, like *Thorpe*, has limited application to cases on appeal. *Bradley* was a civil rights suit brought under the Civil Rights Act of 1871. *Id.* at 699. In that case, a statute providing for attorney fees was passed while the case was pending before the court of appeals. *Id.* at 709. The Supreme Court held that the court of appeals should have applied this newly enacted provision to allow the plaintiffs to recover for expenses incurred before the statute's effective date. *Id.* at 721.

In *Bradley* the court was merely confirming a prior district court order that allowed attorney fees under the private attorney general theory. *Id.* at 708. Accordingly, the attorney fee provision that was applied to the parties in *Bradley* arguably constituted a mere codification of the law as it existed before its enactment. Moreover, considering that the district judge had already calculated the amount of allowable attorney fees up to a certain date, the application of this statute did not require the parties to relitigate the issue of what constituted reasonable attorney fees. This means that the danger of requiring parties to redo damage proceedings once the hearings were completed and the case reached appeal was not at issue in *Bradley*. Moreover, considering that attorney fee provisions are not as closely intertwined with the issue of liability as are other types of damage provisions, the application of this provision on appeal did not run the risk of requiring the trial court to reassess liability determinations.

Bradley was a unique case where the application of an attorney fee provision on appeal did not require the parties to redo prior proceedings. *Bradley's* precedent on ap-

peal will, therefore, apply only to cases with a factual backdrop similar to that in *Bradley*. This means that on appeal *Bradley*, at the most, applies when evaluating damage provisions that do not affect substantive rights, and arguably applies only to attorney fee provisions. Accordingly, among the provisions of the 1991 Act that the parties point to as relevant to this litigation, only Section 102, which contains provisions regarding the availability of compensatory and punitive damages under Title VII, is even arguably applicable under *Bradley*. Nevertheless, *Bradley* does not require this court to change our determinations in *Mozee II* because no damage issues were before us in that interlocutory appeal. In other words, a retroactive application of Section 102's damage provisions on appeal would not change our decision in *Mozee II*.

As Justice Scalia noted in his concurrence in *Bonjorno*, the other cases in which the Supreme Court has relied on the *Thorpe-Bradley* presumption when applying newly enacted statutes to pending cases involved the application of judicial decisions and not statutory provisions; the application of statutes that were expressly retroactive; or the use of a new statute to regulate future conduct, which is actually a prospective, rather than a retroactive, application of the statute. *Bonjorno*, 494 U.S. at 852. (Scalia, J., concurring). Therefore, these later cases do not change our determination that *Bowen's* general presumption of prospective application is the general rule on appeal and that the *Thorpe-Bradley* presumption of retroactive application only applies in very limited circumstances on appeal.

Following *Bowen's* presumption of prospective application, we will not retroactively apply the provisions of the 1991 Civil Rights act to change our disposition of the issues that were before this court in *Mozee II*.[4] *See Vo-*

[4] The dissent argues that it is irrational and unjust to mechanically apply rules of construction to the facts of this case. We agree that the rules of construction generally requiring retroactive ap-

gel, 1992 U.S. App. LEXIS at *10 (read *Bradley* narrowly and therefore refused to retroactively apply the 1991 Civil Rights Act on appeal).

D. *Application of the 1991 Civil Rights Act on Remand*

As we stated above, courts should not retroactively apply statutory provisions that define the scope of a party's substantive rights and obligations at any stage of the proceedings. The rationale behind this conclusion is that it is unfair to make persons accountable for acts that did not violate statutory laws when they were performed. This means that any such provisions defining a party's substantive rights should not be retroactively applied on remand. The next question becomes whether the general presumption of prospective application also applies to damage or procedural provisions relevant to the issues remanded in *Mozee II*.

The trial court's application of the trial procedure in effect at the time of the trial does not seem to raise the same concerns as the retroactive application of provisions

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plication of judicial decisions and prospective application of statutory provisions have lead to an odd result in this case. The odd result being that Section 101(b) of the 1991 Civil Rights Act mirrors the manner in which courts prior to the Supreme Court decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 [49 FEP Cases 1814] (1989), construed Section 1981 claims under the former Civil Rights Act—a construction which prevailed at the time of the defendant's relevant conduct and at the time of trial. Although unfortunate, we do not agree that this result is either unjust or irrational. First, the dissent ignores the fact that the Supreme Court opinion in *Patterson* indicates that the pre-*Patterson* interpretation of the former Act was simply wrong. Second, the dissent's approach comes down to a balancing of equities—an approach which is difficult to apply with any certainty. Indeed, it is far from clear that the equities in this case favor a retroactive application of the 1991 Act. We must remember that this case has been in litigation for fifteen years. A remand under a new statute after fifteen years of litigation seems anything but just.

defining a party's substantive rights and obligations.[5] That is, procedural rules generally regulate trial proceedings, and these rules are not generally targeted at proscribing unwanted conduct. Therefore, it does not seem unfair to require parties to comply with the rules of procedure applicable at the time in which they begin a new trial proceeding, especially considering that most persons and entities are not likely to conform their conduct in light of a slight change in the procedure that will be rendered if they violate the law.

Likewise, the policy underlying the *Bennett* decision is not implicated when applying the damage provisions in effect at the time in which proceedings are initiated. Granted, the greater an award of damages for proscribed, unwanted conduct, the less likely that persons and entities will perform this unwanted conduct. Nonetheless, the traditional theory underlying at least compensatory damages is that they are meant to compensate parties for their losses. *See* Dan B. Dobb, Remedies § 3.1 (1973). Because society's valuation of a victim's losses understandably changes over time, it does not seem unfair to force litigating parties to comply with the more recent statutory changes with regard to damages.

Moreover, when a trial court begins an entirely new proceeding, there is no danger that an application of the

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[5] Considering that procedural rules are aimed at regulating trial proceedings and not the parties' underlying conduct that gave rise to the trial, it is arguable that even a prospective application of a procedural rule requires the trial court to apply the procedural law in effect at the beginning of the trial. In other words, the requirement that the trial court apply the procedural law at the time of the trial is not necessarily a rule that requires a retroactive application of a statute. *See Bonjorno*, 494 U.S. 857-58, n.3 (Scalia, J., concurring) (even under a purely prospective application of a statute it is not always clear when a statute should be applied to parties because whether or not the statute should apply "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated.").

new statutory provisions will require duplicative proceedings. Therefore, one of the primary reasons that appellate courts should not apply newly enacted procedural and damage provisions does not apply when a trial court *begins* new proceedings.

For the above reasons, it is *arguable* that courts should apply the procedural and damage provisions in effect at the time of the trial. *See Lussier v. Dugger*, 904 F.2d 661, 665 [53 FEP Cases 443] (11th Cir. 1990) (quoting *United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980) ("'statutory changes that are procedural or remedial in nature apply retroactively.'")). Indeed, this court's recent decisions in *Wright* and *Littlefield* in which this court applied the *Thorpe-Bradley* presumption of retroactive application may arguably be explained on this basis.[6]

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[6] In *Wright* this court applied the *Bradley* presumption to a statute enacted *before trial* when deciding whether or not to follow the seemingly procedural statutory requirements that estopped parties from presenting certain types of evidence to the court. *Wright*, 942 F.2d at 1095-97.

In *Littlefield* this court applied *Bradley* when applying statutory changes which resulted in the removal of a cap on punitive damages. *Littlefield*, 954 F.2d at 1345. These statutory changes were enacted before trial. *Id.* Granted, punitive damage provisions, which are aimed at deterring future conduct, arguably impact substantive rights. Nevertheless, a change in the amount of recoverable punitive damages is arguably different than the enactment of a statute which initially provides for punitive damages.

Moreover, both *Littlefield*, and *Wright* might also be distinguished on the basis that the result in those cases would have been the same without the application of the statute. For example, in *Wright*, this court emphasized that the statute at issue was essentially codifying the pre-existing common law. *Wright*, 942 F.2d at 1096-97. Likewise, in *Littlefield*, it appears that the result would have been the same without a retroactive application of the statute because in that case another controlling statute allowed for punitive damages without a cap. *Littlefield*, 954 F.2d at 1345.

Nevertheless, considering that *Bowen* is the general rule of construction, there is a flip side to the argument that courts should apply the procedural and damage provisions in effect at the beginning of proceedings. In short, it may cause undue confusion to require a trial court to conduct a provision-by-provision analysis of an act in order to distinguish between those provisions regulating procedure and damages and those provisions that affect substantive rights and obligations. In fact, the Court of Appeals for the Sixth Circuit's decision in *Vogel* apparently stands for the proposition that because some of the 1991 Act's provisions affect substantive rights, the entire Act should be prospectively applied. *Vogel*, 1992 U.S. App. LEXIS at * 10. This position is not without merit.

In any event, we need not decide what procedure and damage provisions a trial court should apply at the beginning of a trial in order to assess the applicability of the 1991 Civil Rights Act to the issues remanded in *Mozee II*. Even if a trial court should apply the procedural and damage law in effect when it initiates an entirely new proceeding, this does not mean that the district court in this case should apply the 1991 Civil Rights Act's procedural and damage provisions on remand. This is because *Mozee II* was an interlocutory appeal where this court affirmed in part, vacated and remanded in part, and reversed in part. Therefore, the remand in *Mozee II* does not require an entirely new proceeding. Instead, the remand requires the district court to reconsider some of the plaintiffs' numerous theories for relief under Title VII. As such, the application of the new procedural and damage provisions to the issues on remand would mean that the remanded Title VII claims would be governed by different law than those claims which were affirmed in *Mozee II*. This result would be both inequitable and confusing. Considering that the interlocutory remand in *Mozee II* will not initiate an entirely new proceeding, the district court should not apply any of the 1991 Civil Rights Act's provisions on remand.

III.

CONCLUSION

After carefully considering the supplemental briefs on the issue of retroactivity, this panel finds it unnecessary to grant a rehearing on this issue. Furthermore, we find no other basis on which we need to grant rehearing. This panel, therefore, denies the petitions for rehearing. Moreover, for the above reasons, we reaffirm our decision in *Mozee II*, and we direct the district court to proceed on remand pursuant to the instructions given in *Mozee II* and this opinion.

Dissenting Opinion

RICHARD D. CUDAHY, Circuit Judge, dissenting:—The majority has done a thorough, but, in my view, abstract and mechanical, job in analyzing the impact of the Civil Rights Act of 1991. The specific facts of the real-life case before us seem to me to cry out for a different solution. The joint presumptions that court decisions operate retroactively while legislation operates prospectively have combined here to produce a result that is neither rational nor just.

The Civil Rights Act of 1991 (insofar as it is relevant here) overrules a key Supreme Court decision—*Patterson v. McLean Credit Union*, 491 U.S. 164 [49 FEP Cases 1814] (1989). But all the events giving rise to liability in the case before us—acts of intentional racial discrimination allegedly pervading the employment relationship—occurred many years before *Patterson* was rendered. Even the lawsuit was brought long before *Patterson* was decided.

Patterson became the law for a short time as this case was inching through a thicket of litigation, and the opinion in this case as presently written assumes that it is still in effect. Now, however, Congress has chosen to

erase *Patterson* from the books. So, as I write, the law is the same as that prevailing at the time the discriminatory events took place and at the time the lawsuit was filed. In other words, *Patterson* was the effective law of the land at no time that is relevant to the disposition of this case. No one relied on it when liability was incurred in this case, nor can we rely on it now that it has been overruled by Congress.

In addition to the anomalous result it produces in this unusual case, the majority's opinion has a number of defects on its own terms. For example, the majority admits that the explicitly prospective language of sections 402(b) and 109(c) suggests retroactivity for the rest of the Act, but finds that language "not sufficiently probative of congressional intent." *Supra* at 6. At the same time, the majority also admits that the legislative history is generally opaque. *Supra* at 8. Although I agree that section 402(b) is clearly surplusage, there no reason to treat section 109(c) similarly. Given the general lack of information, we should give effect to the only direction Congress provided: if section 109 is to apply prospectively, the rest of the Act is retroactive. *See Stender v. Lucky Stores, Inc.*, 780 F.Supp. 1302, 1303 [57 FEP Cases 1445] (N.D. Cal. 1992) (plain language of Act supports retroactivity).

I also believe that the majority errs when it asserts that, among the provisions relevant to this litigation, only section 102, which provides for compensatory and punitive damages under Title VII, "is even arguably applicable under *Bradley*." *Supra* at 16. Although section 101 is phrased as a substantive ban on discrimination, its effect is to make the damage provisions of 42 U.S.C. § 1981 applicable to conduct that Title VII has always prohibited. Section 101 merely provides new remedies for old wrongs. Insofar as these new remedies include compensatory damages, section 101 appears to be the kind of "damage prosion[] that do[es] not affect substantive rights" that may

be presumed to be retroactive under *Bradley*. *Supra* at 16. Arguably, even under the majority's analysis, we should apply section 101 of the Act and reinstate the plaintiffs' claims under section 1981. *See Mozee II*, 940 F.2d at 1051-55. And these points certainly do not exhaust the catalog of exceptions that may be taken to the majority's approach. *See generally Mojica v. Gannett Co.*, 779 F.Supp. 94 [57 FEP Cases 537] (N.D. Ill. 1991).

Whether we consider the facts of this case or the language of the Act, *Patterson* should not apply here, and the opinion *Mozee II* should be revised in accordance with the law applied before *Patterson* was decided. Through a mechanical application of principles that are ill-fitting here, the majority has succeeded in applying rules of law not relied upon at the time of the discriminatory acts, not recognized when the lawsuit was brought and not in force now. This is substantially unjust to the plaintiffs and I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 90-2660

WILLIAM O. MOZEE, GREGORY L. RANKIN,
FREDERICK WILLIAMS, *et al.*,
Plaintiffs-Appellees,

v.

AMERICAN COMMERCIAL MARINE SERVICE COMPANY,
Defendant-Appellant.

Argued Jan. 23, 1991

Decided Aug. 14, 1991

Ronald E. Elberger, Mark R. Waterfill, Bose, McKinney & Evans, Mark W. Ford (argued), Johnson, Smith, Densborn, Wright & Heath, Indianapolis, Ind., Samuel G. Hayward, Levin & Hayward, Louisville, Ky. Jerry Ulrich, New Albany, Ind., for plaintiffs-appellees.

James S. Whitehead (argued), Sidley & Austin, Chicago, Ill., John K. Gordinier, Michael W. Lowe, Frank G. Simpson, III, Pedley, Ross, Zielke, Gordinier & Porter, Louisville, Ky., Lisa L. Fleming, American Commercial Marine Service Co., Jeffersonville, Ind., for defendant-appellant.

Before WOOD, Jr., CUDAHY and FLAUM, Circuit Judges.

CUDAHY, Circuit Judge.

Defendant American Commercial Marine Service Company, Jeffboat Division (Jeffboat), brought this interlocutory appeal to contest the finding of liability against it in this civil rights suit. Plaintiffs are five African-American former employees of Jeffboat, and they sue in both their individual capacity and as class representatives. The district court found defendants liable for violating various provisions of Title VII and section 1981. We affirm in part, reverse in part and vacate and remand in part.

I.

This opinion marks our second encounter with this litigation, and it may not be our last. Filed in 1977, the case was originally tried before the late Judge Holder, who found for the defendant on all counts. We reversed that decision on appeal, however, holding that "the findings of fact made after trial by the district court [were] insufficient to permit meaningful appellate review." 746 F.2d 365, 367 (7th Cir.1984). We instructed the district court on retrial that it should not feel bound by the law of the case or by any similar analytical constraint. After remand, the case was retried before Judge Parsons.[1] The district court issued several thorough opinions on liability, which, on balance, favored the plaintiffs. Among these opinions was an order reaffirming the court's judgment in light of the intervening Supreme Court decisions in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) and *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).[2] The district court then granted defendant's

[1] The case was required to be reassigned due to Judge Holder's unfortunate death. The litigants agreed in the second trial to stipulate to the record of the first trial, but to supplement that record as the need arose. Introduction and Preface at 4 (June 7, 1990).

[2] The district court's decision is divided among three orders: its order after trial, Mem.Op. and Order (March 17, 1988) (hereinafter

request to seek interlocutory appeal. Our order allowing the appeal was issued on July 12, 1990.

This case well illustrates the substantial difficulties in maintaining and in defending a statistics-based class-action discrimination suit. We are grateful to the district court for its comprehensive scrutiny of the arguments of both parties. With this more complete treatment of the evidence by the district court, we believe we may take a fresh look at the facts (rather than merely rehash our earlier opinion).

Jeffboat has operated its immense shipbuilding facility on the banks of the Ohio River in southern Indiana since 1938; maritime construction on the property dates at least as far back as 1876. Through the 1950s, Jeffboat operated its facility with an all-white work force. But societal and governmental pressures associated with the civil rights movement brought changes, and by 1970 minorities represented 14.1% of the company's new hires.

As a government contractor, Jeffboat was required by federal law to engage in affirmative-action programs focusing on improving both its hiring and on-site training programs. The first such plan was adopted in 1972 and back-dated so as to run from 1971 to 1973. A second federal affirmative-action plan was later adopted, though not until 1977. In the interim, Jeffboat was obligated by a consent agreement with the Indiana Civil Rights Commission to follow an affirmative-action program in its hiring and promotion practices.

Notwithstanding the adjustment of Jeffboat's hiring practices and its submission to these affirmative-action plans, many minority employees believed that discrimination continued to pervade the facility's operations,

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Trial Order), its order following defendant's motion for reconsideration, Mem.Op. and Order Re: Motion for Reconsideration (Sept. 28, 1988), and its order following the *Patterson* and *Wards Cove* cases, Mem.Op. and Order (Sept. 6, 1989) (hereinafter *Patterson* Order).

affecting certain post-hire practices. Following their termination from Jeffboat, four named plaintiffs filed this suit in 1977: William O. Mozee, Gregory L. Rankin, Frederick Williams and Joe L. Malone. An action by a fifth named plaintiff, Harold Barnes, was filed in 1978 and was consolidated with the earlier case for trial. The court granted the plaintiffs class certification on August 17, 1978.

Plaintiffs have charged the defendant with discrimination and with retaliation in violation of sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e-2(a), 2000e-3(a) (1976),[3] as well as with violations of section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976).[4]

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[3] Title VII, section 703(a) of the Civil Rights Act of 1964 reads:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a), Section 704(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

42 U.S.C. § 2000e-3(a).

[4] Section 1981 insures that

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

42 U.S.C. § 1981.

They hoped to prove their Title VII claims of class-wide discrimination by either the disparate treatment or disparate impact methodology. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977) (disparate treatment); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (disparate impact). Only proof of disparate treatment would permit an award under section 1981. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S.Ct. 3141, 3150, 73 L.Ed.2d 835 (1982). The plaintiffs chose several areas of post-hire decision-making at Jeffboat for scrutiny: promotions, bid awards, seniority rights, job assignments and various disciplinary determinations. Complaint—Class Action at 36-37. The evidence marshalled by the plaintiffs can be divided into two categories, individual occurrences and class-wide proof.

A. Individual Occurrences

The district court found that each of the individual plaintiffs experienced discrimination in one or more areas of treatment at the hands of Jeffboat. Defendant does not appeal the factual determinations leading the district court to find it liable with respect to the individual plaintiffs.[5] Nevertheless, anecdotal evidence of discrimination may be used to supplement a showing of class-wide disparate treatment, *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir.1985), and the district court relied on such evidence in this case. Because Jeffboat challenges the sufficiency of the evidence supporting the determination of class-wide discrimination, we will summarize the district court's findings of individual discrimination.

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[5] As will be seen, the employer does appeal the legal foundation for the plaintiffs' individual section 1981 determinations, following the decision in *Patterson*, 491 U.S. 164, 109 S.Ct. 2363. This question is treated together with the class determinations involving the same question, *infra* at 1051-52.

William Mozee

William Mozee charged Jeffboat with discrimination in failing to promote him, failing to satisfy his arbitration award and exercising retaliatory or racially motivated discipline and discharge. Mozee was an overhead crane operator at Jeffboat in June 1975, at which time a higher position became available as a gantry crane operator. The position was to be awarded through the bidding system, which selects among equally qualified employees the candidate with the most seniority. Of the five employees submitting bids for the gantry crane position, three were white and two were African-American. Two of the white employees and the other African-American applicant were eliminated from consideration for reasons irrelevant at this point, leaving Mozee and Earl Cartreete. Despite Mozee's greater seniority compared to Cartreete, the white employee received the promotion.

Mozee went to arbitration, where Jeffboat conceded that the two were equally "qualified" but defended its action on the ground that Mozee's poorer attendance record made him less desirable. The arbitrator found that this justification violated the collective bargaining agreement and ordered Jeffboat to award Mozee the job and retroactive compensation. Jeffboat eventually paid Mozee retroactive compensation but the gantry crane position he sought was eliminated before the company could place him there. The district court agreed with Mozee (and the arbitrator) that awarding the position to Cartreete represented an aberrational promotion practice evidencing an intent to discriminate on the basis of race. The court refused to hold Jeffboat responsible for not satisfying the arbitration award, however, finding no failure to comply.

Mozee was one of many employees who took part in a mass protest against Jeffboat for its alleged discriminatory practices. The August 1975 demonstrations, known as the "Black Days" protests, involved speeches, petition signing and a call for negotiations between the Black

Workers' Coalition and Jeffboat's administration. After notifying Jeffboat of his intent to miss work, Mozee participated in both the August 11 and August 21-22 protests. Immediately upon his return after each protest, Mozee was disciplined—first with a five-day suspension and then with the stiffest allowable ten-day suspension. The district court found that under *Collins v. Illinois*, 830 F.2d 692, 702 (7th Cir.1987), Mozee had made out a prima facie case of retaliation and further found that the disruption caused by his absence did not outweigh the value of carrying out Title VII's policies. It went on to discredit Jeffboat's nondiscriminatory justification as pretextual, noting that white employees with similar avoidable absences had in the past faced far less rigorous penalties. *Parker v. Secretary, U.S. Dept. of Housing and Urban Dev.*, 891 F.2d 316 (D.C.Cir.1989).

Finally, Mozee claimed his discharge in August 1976 was racially motivated. After an extended absence from work, excused for medical and other reasons, Mozee returned on August 2, 1976, but experienced a string of tardies for eleven consecutive days. The record that Jeffboat kept of these delinquencies seemed to reflect disproportionate scrutiny; this and other indicia led the district court to question the treatment accorded Mozee. Comparisons to white employees shown to be similarly situated revealed that whites received much more lenient treatment, even after two or three times as many tardies. The district court determined that Mozee's termination had been racially motivated. (It rejected Mozee's claim that the discharge was retaliatory, believing there to be a failure of proof of causation.)

Frederick Williams

Frederick Williams, like Mozee, worked for Jeffboat as a rail crane operator in June 1975 and applied for the opening as a gantry crane operator. His bid was rejected because he was deemed unqualified due to a physical

defect. Williams' defect, a congenital problem with his left hand, had been in existence at his hiring in 1968 and continued during the various promotions which brought him to his position as a rail crane operator. The defect had not caused any accidents or occasioned any charges of improper operations against him as a rail crane operator. Nevertheless the company cited as justification for disqualifying Williams the possibility that he would not be able to handle the gantry crane's many operating levers during an emergency situation. He was therefore unable to bid for the position, which eventually went to a white worker ranking below him in seniority. Williams' first claim alleged that the disqualification decision was in fact grounded in discrimination.

The district court placed on Williams the burden of proving that Jeffboat's justification for its treatment of him was pretextual; Williams failed. The court held that, while the employer offered no medical evaluation to support its determination, the mere fact that the decision was poorly supported did not necessarily show it to be pretextual. Williams was thus not able to show that Jeffboat's concern centering on the complexity of the crane and the safety of the crew was pretextual.

In Williams' second claim he argued that he was discharged due to his race. On Friday, July 18, 1975, Williams sought an "out-gate" pass to leave work early for personal reasons but was denied. After the mid-shift break in the afternoon, he received a phone call from his wife to return home for an emergency. Jeffboat granted him the pass, but requested verification of the emergency. The following Monday, Williams returned to work without an adequate written excuse. The company discharged him for insubordination in violation of company rule six. Williams won his case before the arbitrator, who awarded him reinstatement but not back pay. He brought the same claim in the district court.

The district court found Williams' termination racially discriminatory. It agreed with Jeffboat that the offense was one sanctionable by termination but went on to find that Jeffboat disciplined many white employees in similar situations merely with suspensions. Because Jeffboat could not defeat this showing of pretext, the district court found for Williams.

Gregory L. Rankin

Another employee involved in the Black Days protests, Gregory Rankin, was terminated shortly after they took place. In addition to the two days of demonstrations he attended on August 20 and 21, Rankin also missed work on August 22 due to car trouble. Jeffboat was aware before each absence of Rankin's excuse. Nevertheless, the company ordered a discharge hearing on August 27, when Rankin was required to present a written excuse for each of his three absences. Because the company would not accept attending the protest as an excuse for absence, only the car trouble excuse remained viable. Rankin refused to provide a written excuse, and he was discharged. As part of its justification for this discharge, Jeffboat cited two prior instances when Rankin had been discharged but later, on reconsideration, had been reinstated.

Based on its determination of common practice at Jeffboat, the district court found Rankin's discharge to be racially motivated. It found many examples of white employees who had missed work on numerous occasions for "car trouble" without having to face a demand for verification. One such worker experienced fourteen incidents of car trouble without ever needing verification. Even when Jeffboat finally began asking that employee for verification, further incidents continued to go unverified. Another white employee missed three consecutive days without excuse and even phoned in later in the month that he had car trouble—all without need for

verification and without being disciplined. The district court also noted that white employees with prior voided discharges usually enjoyed, unlike Rankin, the expungement from the record of those disciplines. Considering all the evidence, the district court held Jeffboat liable for discriminatory and retaliatory discharge.

Joe L. Malone

Joe Malone was employed either as a welder or as a material checker from 1970 until his discharge in 1975. In 1973, Malone began experiencing problems with alcohol. His addiction forced him to take a month-long medical leave in April 1973 and another one in December 1973. It also resulted in a six-day suspension in November 1973 for working while under the influence of intoxicants. Not until May 1975, almost eighteen months after these events, did Malone experience another alcohol-related absence. This time he missed a week at work to obtain detoxification treatment. Jeffboat had notice of his absence on May 13 when he first called in sick, and again on May 15, when his wife informed the company of his in-hospital treatment. On May 16, the hospital called Jeffboat and verified the hospitalization. On his return, Malone was ordered to produce verification, which he did. He was nevertheless fired for extended absence without furnishing a report containing justification.

The district court relied on two factors in concluding that Malone had suffered discrimination on the basis of his race. First, the company changed its proffered justification for firing him several times in the course of considering his grievances. Second, many whites who experienced similar problems with alcohol were treated much more leniently than Malone. Many either had an equal number or more absences but received less serious punishment. In addition, some white employees were allowed back to work on condition of their participating in a professional help program. Hence the court determined that,

while Jeffboat's treatment of Malone was understandable in the abstract, it was discriminatory when placed in the context of the company's shifting defenses and its treatment of similarly situated white workers.

Harold Barnes

Harold Barnes joined Jeffboat on July 31, 1972, eventually working his way up to welder first class. He was discharged on May 14, 1976, following an incident of alleged insubordination on the job. While his shift worked in the yard one afternoon, it began to rain. The union steward complained that work should be halted, but the foreman in his discretion made the decision to continue. Barnes ignored his legitimate options—getting rain gear provided by the company, requesting a medical determination based on a recent bout with pneumonia or asking for an out-gate pass due to illness—and instead simply refused to work in the rain. After a meeting with the personnel office, Barnes was discharged for insubordination.

The union refused to pursue Barnes' grievance. Nevertheless he brought suit against Jeffboat, conceding that he had violated work rule six but presenting numerous accounts of white employees whose similar or more serious conduct was met only with reprimands or suspensions. The district court agreed with Barnes and found Jeffboat liable for discriminatory termination. Apparently the district court believed that Barnes like Mozee and Rankin was a victim of retaliation for his participation in the Black Days.

B. Class-Wide Proof

The plaintiffs presented two types of evidence tending to show class-wide discrimination at Jeffboat. They offered statistical evidence of disparate promotion and discipline practices at the plant, evidence which was probative both of disparate impact and of a pattern or practice of disparate treatment. *Cox v. Chicago*, 868 F.2d

217, 222 (7th Cir. 1989). Plaintiffs also adduced further evidence of a general policy of racial discrimination around the facility, which bolstered their claim that Jeffboat intended to implement a pattern or practice of discrimination. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988).

For their disparate impact claim, plaintiffs isolated as the discriminating employment practice the subjective promotion and discipline system used by Jeffboat. Basing a disparate impact claim on subjective employment practices was expressly accepted by the Supreme Court in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990, 108 S.Ct. 2777, 2786, 101 L.Ed2d 827 (1988). With respect to promotions, plaintiffs claimed that Jeffboat employed discriminatory subjective promotion practices in appointing both leadmen [6] and foremen. The district court analyzed the statistics presented by the plaintiffs, but found sufficient disparity between the races in promotion to make out a disparate impact claim only in promotions to leadmen.[7] Using plaintiffs' statistics, the number of

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[6] A leadman is the highest position available to members of the bargaining unit. Selection of leadmen was left entirely to management's discretion, since it fell outside the seniority bidding system applicable to most hourly employment positions. Due to its supervisory element, the leadman position was understood to be a necessary step along the progression to a management position as a foreman. Trial Order at 13.

[7] In analyzing the statistics, the district court relied on the Supreme Court's suggestion in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977), that a 5 percent or less probability that the numbers resulted from chance would generally state a disparate impact claim. *Mister v. Illinois Central Gulf R.R. Co.*, 832 F.2d 1427, 1437 (7th Cir.1987); *Coates*, 756 F.2d at 537 n. 11. Although the only available statistical analysis of promotions to foreman indicated that the standard deviation met this requirement (amounting to a 1.99 standard deviation, or less than the 5 percent chance deemed a threshold in *Castaneda*), the district court rejected this proof for two reasons. First, the figures included promotions from 1971 to 1974 as well

African-Americans actually promoted to leadmen fell short of the expected number of promotions by 2.13 standard deviations. That figure grew to more than 3 when the statistics included years leading up to the lawsuit. In using plaintiffs' statistics the district court explicitly rejected as unpersuasive defendant's attempt to offer a more refined statistical analysis. We leave recounting of the specifics of this holding to our treatment of Jeffboat's claims on appeal.

Plaintiffs also convinced the district court the defendant's subjective practice of administering discipline and discharge for attendance problems produced a disparate impact on African-American employees. Plaintiffs produced statistics showing that the defendant terminated African-American employees at a much higher rate than

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as from 1974 through 1978, when the evidence stopped. Thus four years outside the relevant time period (which began 300 days prior to the date Mozee filed his claim with the EEOC) were included in the standard deviation calculation. This pre-lawsuit information may be probative of discrimination, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977), but because it is not strictly applicable, the district court rejected the figures for statistical purposes. Trial Order at 54-55. Second, the standard deviation of 1.99 was simply too close to the threshold of significance (1.96 standard deviations) for the district court to find discrimination. *Id.* at 54. While we do not necessarily approve fully this "too close to call good" approach to legal analysis, the plaintiffs do not challenge the determination on appeal.

In rejecting the claim of discrimination in foreman promotions, the district court also found inappropriate in this case the "one-tail" method of statistical analysis offered by the plaintiffs. Whereas a "two-tail" methodology requires a 1.96 standard deviation to produce *Castaneda's* 5 percent probability of chance ocrurrence, a "one-tail" analysis would reach the same 5 percent threshold at only a 1.65 standard deviation. *Palmer v. Shultz*, 815 F.2d 84, 92-93 (D.C. Cir.1987). The district court found the reasoning in *Palmer* apposite to this case, and so required proof under the two-tail test. Again, plaintiff does not challenge this holding on appeal, and so we have no occasion to comment on *Palmer* or the legitimacy of applying a one-tail test in Title VII discrimination lawsuits.

would be expected in a random distribution, higher by more than 6 standard deviations. The trial court did not refer to any statistics offered by plaintiff regarding other disciplinary measures. Defendant again attempted through the use of more refined statistics to show that the analysis of involuntary termination in fact resulted in a disparate impact on African-American employees *but for nondiscriminatory reasons*. The district court disregarded this proffer both because of the many flaws the court discovered in the compilation of Jeffboat's statistics and because the plaintiffs were able to use these very statistics to bolster their case. This ruling too is challenged on appeal.

Turning to the plaintiffs' pattern or practice case against Jeffboat, the district court considered the statistical proof discussed above as well as the anecdotal evidence presented in the named plaintiffs' individual claims, citing *Teamsters*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In addition, the court considered nonstatistical proof of class-wide discrimination. For example, Jeffboat employed a practice of stamping each African-American job applicant's file with the initials "DW," a mark which defendant concedes refers to a local African-American civil rights activist named David Wright. While Jeffboat defended this practice as a means of implementing its affirmative action plan, the court found that the mark "added an inference of contempt to the designation of the race of the black employee. . . ." Trial Order at 24-25. The district court also noted that a sign in the production yard, where no African-American worked in the rigging unit until 1973, declared "No Niggēr Riggers." Further, the court found that white employees were permitted to request lateral bids while African-American employees were informed that such bids were not authorized.

As additional proof of Jeffboat's intent to pursue a pattern or practice of discrimination, the court pointed to

Jeffboat's "dismal" performance in implementing its affirmative action plans. *Id.* at 130. The court found that Jeffboat failed to inform its supervisors and salaried personnel (those employees responsible for the subjective decisions on promotion and discipline) of these plans and their requirements. The company neglected to establish means by which it could monitor compliance with the plans' objectives. Most surprisingly, the judge found that neither the company's affirmative action officer nor his superior, the vice president in charge of personnel relations, possessed even a basic understanding of how such a plan should be implemented. *Id.* at 129-30.

Hence the district court found class-wide liability under a disparate treatment theory with respect to Jeffboat's promotion, discipline and discharge practices. The court specifically denied the plaintiffs' claims with respect to discrimination in several other areas of employee relations, including admission into employee training programs, selection of workers for undesirable job assignments and the filling of vacancies through the job bidding system. The court found that the statistics provided by Jeffboat in these areas demonstrated no disparate impact on African-American employees.

II.

Jeffboat has raised a series of challenges both to the district court's factual findings and its conclusions of law. With respect to factfindings, our scope of review is limited, overturning only those findings which appear to be clearly erroneous. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d at 309. On issues of law, of course, our review is *de novo.*

A. Sufficiency of the Evidence of Class-Wide Discrimination in Promotions to Leadman

Jeffboat takes issue with the district court's determination that plaintiffs have made out a claim of class-wide discrimination in its practices of promotion to the lead-

man position. We have earlier observed that plaintiffs produced statistical evidence, which supported both their claim of disparate impact and their disparate treatment pattern or practice claim. Preliminarily, we note that defendant does not contest the decision to allow plaintiffs to single out a purely subjective step in the promotion process for disparate impact analysis. Such a use of the disparate impact methodology has been sanctioned by the Supreme Court. "We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests." *Watson*, 487 U.S. at 990, 108 S.Ct. at 2786. Jeffboat's practice of allowing its foremen complete discretion in their choice of whom to promote to permanent and temporary leadmen is properly the subject of either a disparate impact or a disparate treatment inquiry.

Plaintiffs' proof of the statistical disparity between the number of class members promoted to leadman and the number predicted by a random distribution consisted of a comparison of the number of African-American leadmen to the number of African-Americans in the hourly work force. Trial Order at 59. These statistics indicated a standard deviation of more than two. The district judge found that number, when coupled with a standard deviation applicable to temporary promotions to leadman of greater than ten, sufficiently significant to make out a prima facie case of disparate impact. The defendant then took up the burden of refuting those statistics. *Allen v. Seidman*, 881 F.2d 375, 379 (7th Cir.1989) ("the defendant can always present evidence to show that there was no disparate impact—that it is merely an artifact of the plaintiff's statistical study"); *Shidaker v. Carlin*, 782 F.2d 746, 750 (7th Cir.1986) ("Defendants may rebut a statistical prima facie showing of disparate impact with statistical evidence of their own. . . .") (citations omitted), *vacated sub nom. Tisch v. Shidaker*, 481 U.S.

1001, 107 S.Ct. 1621, 95 L.Ed.2d 195 (1987). The defendant undertook this refutation through statistical refinements indicating an absence of discrimination.[8]

Specifically, Jeffboat pointed to qualifications which, while not shared by all members of the work force, were, nevertheless, necessary to performance as a leadman. On appeal, Jeffboat argues that the relevant pool must take into account seniority, membership in the craft of the open leadman position and first-class rank within that craft. Appellant's Br. at 26-28. Jeffboat argues that, once these qualifications are considered in selecting the appropriate pool for comparison, disparities in promotion recede or disappear.

In selecting an appropriate pool and performing regression analysis in Title VII cases, the Supreme Court has taught that plaintiffs need not take into account "all measurable variables," but rather must simply include the major factors potentially responsible for any disparity. "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986). We have ourselves understood this principle to require that plaintiffs eliminate " 'the most common non-discriminatory reasons' " for any suggested disparity. *Coates*, 756 F.2d at 541 (quoting *Texas Dept.*

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[8] Defendant argues on appeal that we should recalculate the standard deviation approved at trial due to its belated discovery of a single African-American promoted to leadman during the 1974-1978 period. Appellant's Br. at 29-30. Yet during the first trial, defendant's trial counsel specifically stipulated that the missing promotee—whose existence was only discovered on the eve of trial—would not alter the conclusions reached by the statistical experts, and that stipulation was conveyed to the district court in the second trial without objection. Tr. (Trial II) at 1480-81. Hence defendant's argument, raised first in its motion to reconsider, Defendant's Memorandum in Support of Motion to Reconsider at 34, and rejected as waived by the trial judge, will not be considered by us on appeal.

of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981)). The trial judge's selection of the appropriate variables required to determine a suitable pool for comparison purposes is generally a question of fact and is reversible only if clearly erroneous. *Sears, Roebuck*, 839 F.2d at 309. "Especially where statistical evidence is involved, great deference is due the district court's determination of whether the resultant numbers are sufficiently probative of the ultimate fact in issue." *Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990, 995 n. 6 (7th Cir.1983).

Here the district court rejected the defendant's attempt to limit the pool of employees for comparison purposes, and we cannot say that its decision was clearly erroneous. First, we note that with respect to a promotion system such as this one—where Jeffboat concedes that there were no written criteria for the foremen to follow—the use of hindsight to construct "qualifications" for a position must be viewed with some suspicion. *Crawford v. Western Elec. Co.*, 745 F.2d 1373, 1385 (11th Cir.1984) (expressing doubt over reliability of undocumented, unannounced "framework" for discretionary decisions). The trial judge was correctly dubious of the seductive logic of post-hoc explanation. For example, at trial Jeffboat also claimed that blueprint reading was a requirement most foremen took into account when choosing leadmen. The court disbelieved this assertion, however, when the defendant's own witness testfied that such a skill was not a leadman requirement. Trial Order at 62. Where subsequently discovered "qualifications" are not obvious and are far from uniformly applied, we think their use in determining the promotion pool must be carefully restricted.

The district court found that each of the "qualifications" offered by the defendant lacked sufficient probativeness to refute plaintiffs' prima facie case. "[T]he principal [qualification]," argues Jeffboat in its brief on appeal, is "experience as a first-class employee in the particular

craft in which the vacancy occurred." Appellant's Br. at 26. Nevertheless Jeffboat concedes that nearly ten percent of those it selected from the at-large hourly work force for promotion to permanent leadman were without this qualification. The district court also noted numerous exceptions to this rule in filling temporary leadman openings, Trial Order at 61-62, positions it found to be filled through the same process as permanent leadman. *Id.* at 51-52. Because so many employees outside the first class of the relevant craft were selected for promotions or upgrades, the district court found it inappropriate to limit the selection pool as Jeffboat requested. *Id.* at 61-62. Even as to membership in the same craft as the leadman opening, this "qualification" too had exceptions, especially in temporary promotions. *Id.*; Appellees' Br. at 10.

Jeffboat also offered employee seniority as a qualification a foreman would consider in selecting a new or temporary leadman. We note that this argument does not appear in Jeffboat's post-trial brief, but rather only in its motion for reconsideration. Defendant's Post-Trial Brief at 37-38; Memorandum in Support of Defendant's Motion for Reconsideration, App. A at 5. Even had defendant properly presented the seniority factor to the district court at trial, we think the qualification would have been rejected. Like blueprint reading, this "requirement" was disavowed by the defendant's own witness. Appellees' Br. at 12. More significantly, African-American employees were senior to the white employees actually promoted in eight of the forty-three promotions to permanent leadman. App. at 278 n. 5. With respect to the further "qualifications" presented to the district court, we do not find the rejection of Jeffboat's attempt to limit the promotion pool to be clearly erroneous. We therefore approve the determination of the district court that plaintiffs presented a prima facie case of class-wide disparate impact in Jeffboat's promotional system.

B. Sufficiency of the Evidence of Class-Wide Discrimination in Matters of Discipline and Discharge

We have already referred to the plaintiffs' prima facie statistical case challenging defendant's discipline system. The centerpiece of this showing was a comparison of the involuntary termination rates of African-American and white hourly workers. This comparison produced a gross disparity, with African-American workers terminated at a rate more than six standard deviations higher than terminations of white employees. Trial Order at 66. Like disparities resulted whether the statistics centered on terminations for absenteeism or for insubordination. *Id.* The district court pointed to no other statistics offered by the plaintiffs apart from those termination figures.

Defendant responded to plaintiffs' analysis with its own analysis of the discipline process in hopes of producing more pointed statistics that would eliminate the appearance of discrimination. *Allen v. Seidman*, 881 F.2d at 379. These calculations compared the number of days workers from each racial group were absent or tardy before incurring a first, second or third level offense. The numbers apparently showed that African-American employees actually enjoyed a higher level of tolerance before being subjected to any of the prescribed disciplinary sanctions. Def.Ex. AK-II. The district court rejected this rebuttal for several reasons. First, it questioned the accuracy, and therefore the probativeness, of these statistics due to the many flaws it perceived in their composition. Trial Order at 70-71. It moreover believed that the defendant's statistics were adequately refuted by the plaintiffs, who used the same numbers to show that African-Americans received significantly longer suspensions than whites at comparable offense levels. *Id.* at 71-72.

Jeffboat concedes, as it must following our earlier opinion in this case, *Mozee*, 746 F.2d at 372, that plaintiffs may use statistics to prove the disparate impact of an

employer's disciplinary system in violation of Title VII. Jeffboat thus set out below to contradict the plaintiffs' comparison with its own statistical analysis. In this appeal as in its post-trial brief, however, Jeffboat argues that, before we even reach its statistical rebuttal of plaintiffs' evidence, we must question whether standing alone, the plaintiffs' statistics would permit a finding of disparate impact. Jeffboat points out that in *Coates v. Johnson & Johnson*, 756 F.2d 524, 540 (7th Cir.1985), this court reminded litigants that under Title VII, plaintiffs attempting to make out a prima facie case must take into account the most common nondiscriminatory reasons for the alleged unfair employment practice. *See also Allen*, 881 F.2d at 378 ("A statistical analysis must cross a threshold of reliability before it can establish even a prima facie case of disparate impact.") (citation omitted). For while it is true here that plaintiffs' statistics show that the termination differential was not the result of mere chance, neither do the statistics point directly to discrimination. The plaintiffs' analysis must take into account the major variables one might expect to cause a statistical disparity. *Bazemore*, 478 U.S. at 400, 106 S.Ct. at 3008.[9] In this case as in *Coates*, the defendant contends that the prior disciplinary record of the affected members of each class would explain the disparity in terminations. Although the district court did not credit Jeffboat's own statistics because of errors in calculation, those statistics—which classify disciplinary actions not only by offense levels but by extent of wrongdoing prior to discipline—illustrate that Jeffboat's records would allow a more refined inquiry than that provided by the plaintiffs in their prima facie case.

The district court did not require a more searching approach of the plaintiffs. "To dismiss plaintiffs' statistics

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[9] The Court in *Bazemore* anticipated the same problem we encountered in *Coates:* "There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant. . . ." 478 U.S. at 400 n. 10, 106 S.Ct. at 3009 n. 10.

because of Jeffboat's claim that the statistics fail to account for distributing variables would be improper in the absence of evidence showing the particular variables other than race which would distinguish differences in justifiable discipline between white and black employees." We held in *Coates* that the defendant's offer of termination statistics which took prior disciplinary records into account was probative since it incorporated a nondiscriminatory reason for the disparity shown by the gross figures. *Id.* at 545. Viewed from another perspective, prior disciplinary records are a proxy for, or a measure of, an employee's quality of conduct over an extended period. This may help establish a comparability of conduct among employees with respect to which one can measure termination experience. In this vein, in the case before us, Jeffboat countered plaintiffs' proof of disparate discipline with statistics that indirectly showed African-Americans having worse disciplinary records over time; statistics that took prior offenses into account thus suggested no disparity in discipline at all between African-American and white employees.[10] When an employer's disciplinary system is based in part on a progressive sequence of disciplines, each predicated on both present and earlier offenses, failure to account in the regression analysis for these prior disciplines may detract from the significance of the statistics. Regardless of any inaccuracies and oversights in compiling its statistics, Jeffboat put the plaintiff class

[10] We recognize that comparing plaintiffs' and defendant's statistics may be mixing apples and oranges; plaintiffs' numbers deal with involuntary terminations while defendant's figures involve suspensions for first, second and third level offenses. Nevertheless the district court did not believe it necessary to distinguish between these two, nor does either party argue on appeal that relying on one set of statistics as a backdrop for the other is without meaning. We can only conjecture that the court below considered all showings of disciplinary disparities, whether they involved terminations or suspensions. Such an approach would be appropriate where the same system of discipline accounts for both suspensions and discharges.

on notice that the class had not accounted for at least one of the most well-known nondiscriminatory reasons for disparity—prior disciplinary record, as we have noted, a proxy for, or measure of, prior conduct.[11]

Plaintiffs did attempt to correct this deficiency, using defendant's own statistics to show that discipline was unevenly meted out even when prior records of discipline were the same. The class showed that punishments imposed on African-American employees for second and third level offenses were significantly more severe on average than those meted out to white employees.[12] Nevertheless, the district court relied on this showing only for purposes of calling Jeffboat's statistics into question. In the end the district court apparently placed its essential, if not sole, reliance on the crude statistics offered by the plaintiff class to show disparate impact. In thus relying on an oversimplified showing, the district court erred, and we

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[11] Plaintiffs' case against Jeffboat's promotion practice can be distinguished on precisely this point. The alleged prerequisites to promotion—certain skills, rank, and seniority—would not constitute common nondiscriminatory reasons for denying a promotion in a system employing purely subjective methods. These "qualifications" might affect the selection pool only if the defendant convinced the trier that they were legitimate. Failing that proof, the district court was entitled here to rely on the plaintiffs' comparison to the entire hourly work force because the plaintiffs showed leadman selections to come from all parts of that group. In its discipline case, conversely, the plaintiffs disregarded an objective, contractual component of the discipline process: disciplines at Jeffboat were based in part on the offender's past record. Failure to account for that detail in its regression analysis reduced or possibly erased the statistics' probative value.

[12] Plaintiffs' expert used Jeffboat's own statistics to show that for second offenses African-American employees were suspended an average of 2.64 days while white employee suspensions lasted an average of only 1.83 days; third offenses resulted in an average suspension of 7.8 days for African-Americans, while only 5.79 days for whites. These disparities appear substantial, though neither side has apparently subjected them to standard deviation analysis.

must therefore vacate and remand for further consideration this finding of discrimination in discipline. A factual dispute continues as to whether, taking past disciplinary records into account, there is a disparate impact on African-Americans with respect to discipline and involuntary termination. The district court is free to consider the question again, accepting additional evidence if necessary.

The plaintiff class argues before us that it should not have to account for prior disciplinary records. It cites *Coates* for the proposition that a defendant may not offer as a nondiscriminatory explanation for the disparity in plaintiffs' statistics a factor that is itself a subject of discrimination. 756 F.2d at 544. Thus, the class members here argue that they need not consider prior disciplinary records because the earlier discipline was itself meted out in a discriminatory manner. While plaintiffs are correct in citing *Coates* for the proposition indicated, they ignore the respective burdens on the parties. We held in *Coates* that it often remains the plaintiffs' burden following the defendant's proffer of a nondiscriminatory factor to show that that factor was itself tainted with discrimination. *Id.* At least where there are objective measurements of the underlying conduct subjected to punishment (here, the number of days tardy or absent before each successive step of discipline), the defendant has appropriately articulated its reason for believing the explanatory factor is not biased. *Id.* at 554 (Cudahy, J., concurring). In the case before us the defendant showed that taking records of prior discipline into account eliminated the appearance of disparate impact in the discipline process and asserted without adequate refutation that those records are not the product of discrimination. Plaintiffs can point to no specific finding by the district court, responsive to the defendant's statistical proffer, that the discipline system was inherently biased and therefore ineffective as a nondiscriminatory explanation for the dis-

parate figures. Instead, the class has only the court's broad finding of discrimination in discipline, based so far as we can discern on only the disparity in termination rates. We reject what amounts to an attempt by plaintiffs to bootstrap that proof into both a condemnation of the entire disciplinary system and a justification for disregarding prior disciplinary records as a nondiscriminatory explanation for the gross disparity. On remand the district court may reconsider this matter.

C. Burden of Proof in the Disparate Impact Finding

Jeffboat's third alleged error involves what it believes was an incorrect imposition of the burden of proof in the disparate impact analysis. Title VII allows a "business necessity" defense to a disparate impact showing. This means that an employment practice that results in a disparate effect on a protected group might still survive Title VII if it is sufficiently job-related to constitute a business necessity. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Regner v. Chicago*, 789 F.2d 534, 537 (7th Cir. 1986). Prior to 1989, the law in this circuit and elsewhere dictated that, once a plaintiff established a prima facie case of disparate impact, the defendant incurred the burden of proving that there was a business necessity for employing the challenged practice. *E.g., Washington v. Electrical Joint Apprenticeship & Training Comm.*, 845 710, 715 (7th Cir.1988); *Regner*, 789 F.2d at 537. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), however, changed that understanding. In that case the Supreme Court announced that "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff." *Id.* at 659, 109 S.Ct. at 2126. The trial on liability here had long since ended when *Wards Cove* was announced. Nonetheless, in cases like

Allen v. Seidman, 881 F.2d at 381, we have applied the new precedent to completed trials and remanded for reconsideration.

Jeffboat maintains that we must likewise vacate and remand this case, for the district court, of course, did not follow the precepts of *Wards Cove*, but, instead, placed the burden of proving business necessity on the defendant. The defendant offers examples of this incorrect placement of the burden in this case as applicable to Jeffboat's promotion and disciplinary practices. Because of our decision to remand the disciplinary case for further consideration, we forgo treatment of Jeffboat's *Wards Cove* argument as applied to that area. In the promotions case, defendant complains because the district court "found that Jeffboat had failed to 'establish . . . the job relatedness' of the objective qualifications for leadman. . . ." Appellant's Br. at 19 (quoting Trial Order at 63). The objective qualifications referred to in that passage of the court's opinion are the requirements of seniority, membership in the craft unit of the open leadman position and first-class rank within that craft. If these requirements sound familiar, they should. They are the same limitations Jeffboat argues were necessary to limit the pool of workers from which plaintiffs drew their comparison statistics.

Unfortunately for Jeffboat, this similarity is more than mere serendipity; it reveals the fatal flaw in this argument. In its opinion, the district court began with the finding that plaintiffs had singled out a *subjective* employment practice in challenging the operation of Jeffboat's promotion system, a finding defendant does not contest on appeal. Trial Order at 41-48. The district court based this finding on the fact that Jeffboat's foremen received no formal guidance on qualifications they should require in deciding whom to promote to leadman positions. The defendant did not instruct its foremen

with respect to traits, objectively determined, to be considered prerequisite to leadman promotions.

When plaintiffs use the disparate impact method to challenge an objective job requirement—for example, an employment test or a physical requirement—defendant's business necessity defense must focus on the job-relatedness of that requirement. *See, e.g., Wards Cove*, 490 U.S. at 659, 109 S.Ct. at 2125-26 (citing cases); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n. 31, 99 S.Ct. 1355, 1366 n. 31, 59 L.Ed.2d 587 (1979). These cases illustrate that an objective requirement must relate to the ultimate effectiveness of the employee in that position. Plaintiffs then receive an opportunity to show that a less discriminatory alternative is available. *Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375. When the lawsuit centers on a subjective practice, however, the nature of the inquiry changes.

In subjective practice cases, plaintiffs argue that it is the very subjectivity of the step in the employment process—taking unquantifiable attributes into account—that causes the discrimination. We allow challenges to such practices because of the unfairness in permitting an employer to perpetuate discriminatory effects by relying for discriminatory results on the individual biases of its managers. *Watson*, 487 U.S. at 990-91, 108 S.Ct. at 2786-87. It is thus the very subjectivity of the practice that plaintiffs seek to eliminate. In order to sustain a subjective practice through a business necessity defense, therefore, an employer would have to argue that the subjectivity of the step is job-related—in other words, that something about the position requires the selector to make a subjective evaluation of the applicant's abilities. *See, e.g., Crawford v. Western Elec. Co.*, 745 F.2d 1373, 1385-86 (11th-Cir.1984) (district court upheld subjective promotion system because "it vests the responsibility for promotion in those who are most knowledgeable in the work of the [employees] and who have a direct responsibility for

the proper performance of the installation jobs"; appeals court reversed because company could not support this justification); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir.1984) (subjective college tenure decisions deemed job-related because "[a] decentralized decision-making structure founded largely on peer judgment is based on . . . the stake of an academic department in such decisions and its superior knowledge of the academic field and the work of the individual candidate"); *United States v. Hazelwood School Dist.*, 534 F.2d 805, 813 (8th Cir.1976) (subjective factors are permissible as long as shown to be job-related), *rev'd on other grounds*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *see also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L.Rev. 947, 974 (1982).

It is true that after *Wards Cove* Jeffboat should not have the burden of proving that it has a business necessity for employing purely subjective methods in choosing its leadmen. But we need not pursue this inquiry further, for Jeffboat has not even offered an explanation why its selection of leadmen requires subjectivity. Jeffboat has not proffered a reason either at trial (and as reflected in the opinion of the district court) or before us. Instead, as noted, Jeffboat claims that it was error to make it shoulder the burden of proving what requirements its foremen actually applied in choosing a leadman. But, in proffering such requirements, Jeffboat has merely suggested possible limitations on the pool of employees from which the foremen could pick. This is a matter with respect to which the burden is properly on the defendant after the plaintiffs make a prima facie disparate impact case. *Allen*, 881 F.2d at 379; *Shidaker*, 782 F.2d at 750. Moreover, Jeffboat's argument that its foremen were in reality using these objective criteria all along actually cuts against any business necessity defense it might offer. If Jeffboat's foremen were simply choosing leadmen who met specific objective standards (despite no formal instruction from the company to do so), then ostensibly

leaving the decision entirely to the subjective judgment of those foremen would not appear to be a business necessity. The district court was correct in reaffirming its decision on promotion practice after the Supreme Court's ruling in *Wards Cove*, since Jeffboat never offered an appropriate business necessity for using a subjective selection procedure.

D. Sufficiency of the Evidence of a Pattern or Practice of Discrimination

The district court found Jeffboat liable under Title VII not only for the disparate impact its employment practices produced but for intentionally engaging in a pattern or practice of discrimination. Providing class-wide liability for intentional discrimination, or disparate treatment, requires a showing by plaintiffs that the employer conducted business through a pattern or practice of discrimination. *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855; *Sears, Roebuck*, 839 F.2d at 308. More than mere isolated incidents of discrimination, proof in pattern or practice cases requires "that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855 (1977) (footnote omitted). Often plaintiff classes make out pattern or practice showings through a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer's intent to treat the protected class unequally. *See, e.g., id.* at 337-40, 97 S.Ct. at 1855-57; *Sears, Roebuck*, 839 F.2d at 310-11. In this case Jeffboat complains that the district court put too much emphasis on the company's flawed performance under its affirmative-action plan. We understand this argument to be part of an insufficiency of evidence contention. Of course, this brings the "clearly erroneous" standard into play. *Id.* at 309.

The district court grounded its pattern or practice determination in the statistics the plaintiffs produced to

support their disparate impact claim while recognizing that anecdotal evidence was equally important to the claim. Trial Order at 122-23; *see also Sears, Roebuck*, 839 F.2d at 311. Jeffboat's contentions to the contrary notwithstanding, the district court adequately supported its finding with nonstatistical evidence of intentional discrimination. The court did find Jeffboat's noncompliance with its various affirmative-action plans probative of discriminatory intent, as is permitted under *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 415 (7th Cir.1988). Nevertheless, it clearly recognized that such noncompliance is not dispositive of the question: "Evidence of an employer's failure to follow the requirements of an affirmative action plan is also relevant, though not conclusive, in determining intentional racial discrimination." Trial Order at 123 (citations omitted).

The recognition went beyond mere lip service; the court also supported its determination with the anecdotal proof outlined above, namely, discriminatory markings on the employment files of all African-Americans and discriminatory signs posted in working areas. There was more. Strong showings of disparate impact before the jurisdictional time period in this case were relevant to, though not dispositive of, a finding of discrimination. *Id.* at 52. Lateral bids within the same seniority unit were routinely granted whites but denied blacks. *Id.* at 132. Beyond all this, the court found support in the individual plaintiffs' experiences at the hands of the company, especially their treatment following the Black Days protest.

With this anecdotal evidence to support its judgment, we cannot say that the district court's finding that Jeffboat was guilty of a pattern or practice of discrimination was clearly erroneous. We have earlier vacated and remanded the aspect of the case involving the statistical analysis of Jeffboat's discipline system. Whatever the result of that remand, the district court must obviously reevaluate as well its finding of class-wide disparate treat-

ment. That finding now rests in part upon what appears to be a strong statistical disparity in terminations. Therefore, the reevaluation of the discipline claim may well have a significant impact on the viability of the class-wide disparate treatment claim.

E. The Effect of Patterson v. McLean Credit Union *on Section 1981 Liability*

As a supplemental basis of liability, plaintiffs sued under 42 U.S.C. § 1981, which has been held to prohibit private persons from discriminating against certain minorities in private contractual relationships. *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235 (7th Cir.1980). The standards for proving section 1981 liability closely parallel those for Title VII, with the notable exception that proof of disparate impact does not support section 1981 liability since intentional discrimination is required. *General Bldg. Contractors*, 458 U.S. at 391, 102 S.Ct. at 3150. Nevertheless, the district court found disparate treatment, and therefore section 1981 liability, in Jeffboat's treatment of the individual plaintiffs, as well as in the company's class-wide handling of promotions and discipline.

After trial in the case before us, the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). In *Patterson* the Court clarified the scope of section 1981 by limiting its protection to "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 179-80, 109 S.Ct. at 2374. That decision and its progeny obviously impact heavily on plaintiffs' section 1981 claims. Following post-trial supplemental briefing on *Patterson's* effect, the district court reaffirmed each of its liability findings. *Patterson* Order at 27.

This circuit has interpreted *Patterson* to apply retroactively and to exclude from section 1981 coverage actions involving wrongful terminations or other disciplinary procedures. *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991). In addition, *Patterson* circumscribed section 1981 actions for failure to promote. Consonant with its understanding that the statute covers only the making and enforcement of contracts, the Court held that "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981. Cf. *Hishon v. King & Spalding*, 467 U.S. 69 [104 S.Ct. 2229, 81 L.Ed.2d 59] (1984) (refusal of law firm to accept associate into partnership) (Title VII)." *Id.* 491 U.S. at 185-86, 109 S.Ct. at 2377. In addition, this circuit has also interpreted *Patterson* to restrict retaliation claims, allowing such claims only when they involve retaliation for attempting to enforce contractual rights. *McKnight*, 908 F.2d at 111-12.

The effect of these developments on the case before us is substantial although, in some respects, not entirely clear. Thus, regardless of the outcome of our remand on the plaintiff class' pattern or practice claim for discriminatory discipline, *Patterson* and *McKnight* preclude recovery for these claimed injuries under section 1981. Similarly, the individual plaintiffs' claims for wrongful suspension or termination no longer involve section 1981 liability. Plaintiffs' individual retaliation claims and their individual and class-wide promotion claims require closer scrutiny.

With respect to the successful retaliation claims of Mozee, Rankin and Barnes, *McKnight* provides guidance beyond that available to the district court when it issued its post-*Patterson* order.

> [Section 1981] punishes "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract." . . . If, therefore, [the company] had, because of [the plaintiff's] race, obstructed his efforts to enforce his contractual entitlements, for example by retaliating against him for bringing suit to enforce his contract of employment with [the company], the company might be guilty of violating section 1981.
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> . . . The [plaintiff's] complaints were efforts to enforce his rights under anti-discrimination laws, which is a different matter because "the right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."

McKnight, 908 F.2d at 111-12 (quoting *Patterson*, citations omitted).

To frame the issue concisely, then, we must inquire whether the plaintiffs experienced retaliation with respect to an effort to enforce contract rights (as opposed to statutory anti-discrimination rights) and whether any such retaliation occurred because of the plaintiffs' race. Plaintiffs thus face a daunting task if they wish to preserve their retaliation awards under section 1981. The instances of retaliation found by the district judge each involved predominantly the plaintiffs' participation in the Black Days, a series of protests over the unequal treatment of African-Americans at the plant. Equal treatment for African-Americans at Jeffboat was not merely a statutory right; it was guaranteed by their collective bargaining agreement, which promised no discrimination by the company on the basis of color. *Patterson* Order at 12. Thus the first step in the *McKnight* test is met. Plaintiffs claim retaliation for attempting to enforce contrac-

tual rights. Were we required to reach it, we would likely be unequipped to resolve the second question, whether Jeffboat handled these challenges to its disregard of workers' contractual rights any differently because plaintiffs were African-American. The district court made no specific findings to this effect.[13]

There are, however, other factors which bear on the need for a remand. Although the Supreme Court in *Patterson* did not face the issue of retaliation under section 1981, it would presumably, based on *Patterson*, dismiss the claims before us because Jeffboat did not retaliate against any attempt by the plaintiffs to "enforce" their contracts. Writing for five justices, Justice Kennedy described section 1981's prohibitions:

> The second of these guarantees, "the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens," embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race. . . . It also covers wholly private efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations . . . in enforcing the terms of a contract.

Patterson, 491 U.S. at 177, 109 S.Ct. at 2373. This is a very limiting definition of "enforcement" of contracts and must be construed to apply to retaliation as well as other types of claims. Justice Kennedy's references to "legal process," "access to courts" and "nonjudicial methods of adjudicat[ion]" suggest a considerably narrower interpretation of section 1981's term "enforce" than might

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[13] The district court did find that plaintiffs were treated differently than whites insofar as unexcused absences go. Trial Order at 110-11. The question we pose is a different one, however, inquiring whether whites who oppose the manner in which their contracts are performed by Jeffboat receive similar treatment.

previously have been understood.[14] In the three instances in which the district court found retaliation in this case, it apparently did so due to the proximity of the discipline to each plaintiff's participation in the Black Days. Trial Order at 138-40. These plaintiffs therefore did not appear to be seeking access to legal process, nor were they pursuing some nonlegal, adjudicatory solution to their complaints. Thus, while dictum in that case, *Patterson* suggests that the Supreme Court would reject a section 1981 award based on the type of retaliation presented in the case before us. Whatever might be said about the employees' attempts to receive the equal treatment promised them in the collective bargaining agreement, the Black Days, for perhaps obscure reasons, were not, strictly speaking, efforts to "enforce" plaintiffs' contract rights under section 1981 as characterized by the sweeping dictum of *Patterson*. Thus, unless the retaliation awards under 1981 can be attributed to something other than participation in the Black Days, they must be reversed. It is conceivable that retaliation resulted from something other than, or in addition to, the Black Days participation, but we are unable to identify any finding which would point even remotely to other bases of retaliation. We are therefore driven to the conclusion that the

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[14] *Cf. Pinkard v. Pullman-Standard, Div. of Pullman, Inc.*, 678 F.2d 1211, 1228-29 (5th Cir. Unit B 1982) (termination over complaints to foreman about racial harrassment actionable under section 1981), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1269-70 (6th Cir.1977) (same); *De Matteis v. Eastman Kodak Co.*, 511 F.2d 306, 311-12 (2d Cir.) (white employee terminated because he sold his house in predominantly white Kodak employees' neighborhood to African-American employee has action under section 1981), *modified on other grounds*, 520 F.2d 409 (2d Cir.1975); *Price v. Federal Express Corp.*, 660 F.Supp. 1388, 1391 (D.Colo.1987) (termination due to complaints about racial harassment actionable under section 1981); *Gresham v. Waffle House, Inc.*, 586 F.Supp. 1442, 1445 (N.D. Ga.1984) (white employee discharged solely because of marriage to African-American states action under section 1981).

section 1981 retaliation claims of Mozee, Rankin and Barnes, as well as the plaintiff class, must be reversed.

Patterson's final impact on this case involves the plaintiffs' individual and class actions for failure to promote. Since *Patterson*, this court has on at least three occasions addressed the issue whether a new position represents "a new and distinct relation between the employee and the employer." In *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir.1989), we dealt with an accountant whose employer refused him promotions to positions such as finance manager and accounts receivable manager. In that case we suggested an interpretation of *Patterson* that would bar actions when the plaintiff sought a "routine advancement that only existing employees qualify for." *Id.* at 1305. This rule might leave section 1981 as a remedy when, for example, the position sought was instead one for which a stranger to the firm could apply.

> [The interpretation avoids] the anomaly created by a rule that a stranger to the firm could sue under section 1981 if his application for a position was turned down on racial grounds but a person already employed by the firm could not sue even though his application for the identical position was turned down on the identical grounds.

Id. Malhotra was remanded for further fact-finding on this point.[15]

Later, in *McKnight*, we encountered an employee who had been laid off, allegedly due to race, and then retained but in a different division after he filed a discrimination action. While not dealing with a promotion in that case, we again suggested the functional analysis outlined in

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[15] A concurrence in that case noted that the "outsider" analysis would not be exclusive of other tests to determine whether a "new and distinct relation" would arise. *Id.* at 1317 n. 6 (Cudahy, J., concurring). The third judge did not accept the "outsider" analysis. *Id.* at 1317 (Ripple, J., concurring).

Malhotra. 908 F.2d at 109-10. Most recently, in *Bailey v. Northern Indiana Public Service Co.*, 910 F.2d 406, 410 (7th Cir.1990), we were able to avoid the question because the plaintiff failed even to present a prima facie case of discrimination. Courts outside this circuit have suggested a fact-specific inquiry into the overall effect the promotion has on individual components of the plaintiff's employment.[16]

The case before us involves promotions to two positions, gantry crane operator and leadman. The district court found each position represented a new and distinct relation between employee and employer. *Patterson* Order at 5-8. We review the factual components of this decision for clear error. Nevertheless, many of the reasons the court offered to support its finding involved the manner in which an employee could attain or keep either position. The district court discussed the company's unfettered discretion in promoting or demoting such employees. These reasons are inapposite to the new and distinct relation inquiry, which focuses on the responsibilities of the new position *vis a vis* the old one, not the process by which the employee is promoted. As for relevant matters considered by the district court, it found the gantry crane position distinct from other crane positions—aside from the pay increase—only in that directions for that machine's movement came from the plant superintendent rather than the foreman and that its performance affected the work of more plant workers. *Id.* at 7-8. Relevant considerations for the leadman position included only that the leadman possessed some supervisory authority and that the position was a proving ground for foreman selection. *Id.* at 5-7; Trial Order at 13.

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[16] *See, e.g., Harrison v. Associates Corp. of N. Am.*, 917 F.2d 195, 198 (5th Cir.1990); *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908, 910 (4th Cir.1989); *Bennun v. Rutgers, State University*, 737 F.Supp. 1393, 1397-98 (D.N.J. 1990); *Hudgens v. Harper-Grace Hosps.*, 728 F.Supp. 1321, 1325 (E.D.Mich.1990).

The promotions denied in this case would not have created new and distinct relations between the employees and Jeffboat. The district court did not find that an outsider would be considered by the company for either position. Trial Order at 50. Gantry crane operators were chosen by the bidding process among current employees with on-the-job rail crane experience, *Patterson* Order at 7, and leadmen were chosen from within the work force as well. Trial Order at 11-12. Nor did the positions represent so significant a change in the employee's duties and compensation that they qualified as new and distinct relations. Neither move would have placed the employee in a salaried position, substantially altered the role he played in operations or placed him outside the collective bargaining unit. Even the leadman position, with its attendant supervisory function, could only fairly be said to constitute a change in the employee's relation to other members of his bargaining unit, not in relation to his employer. *Cf. Harrison v. Associates Corp. of N. Am.*, 917 F.2d 195, 198 (5th Cir.1990) (promotion from C.R.T. operator to lead C.R.T. operator inadequate to meet *Patterson's* "new and distinct relation" test). Plaintiffs' recovery under section 1981 for Jeffboat's failure to promote must therefore be reversed.

F. Refusal to Redefine the Class

Jeffboat's last allegation of error is that the district court wrongly refused to redefine the class. The company requested that the class be redefined to reflect the absence of any evidence of discrimination or disparate impact after 1978. We need not reach this point at this time. The question of class membership is better left until the district court concludes the damages portion of the trial. At that time its determinations of those employees able to recover under the proof adduced at trial will be appropriate for consideration on appeal.

III.

The claims against Jeffboat by the individual plaintiffs for violation of Title VII are AFFIRMED; those individual claims under section 1981 are REVERSED. The class claims against Jeffboat for Title VIII violations in its promotion practice—both through disparate impact and pattern or practice liability—are AFFIRMED; those claims regarding discipline are VACATED and REMANDED with instructions. The class claims under section 1981 are REVERSED.

APPENDIX C

Relevant Provisions of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991)

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decision prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I—FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.".

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(2) DISABILITY.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section

102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

"(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

"(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

"(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

"(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL.—If a complaining party seeks compensatory or punitive damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) DEFINITIONS.—As used in this section:

"(1) COMPLAINING PARTY.—The term 'complaining party' means—

"(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a (a)(1)), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(2) DISCRIMINATORY PRACTICE—The term 'discriminatory practice' means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

* * * *

SEC. 104. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other train-

ing or retraining program, including an on-the-job training program, or Federal entity subject to section 717.".

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.".

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

* * * *

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) DEFINITION OF EMPLOYEE.—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the

end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) EXEMPTION.—

(1) CIVIL RIGHTS ACT OF 1964.—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after "SEC. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation.".

(2) AMERICANS WITH DISABILITIES ACT OF 1990.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) COVERED ENTITIES IN FOREIGN COUNTRIES.—

"(1) IN GENERAL.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

"(2) CONTROL OF CORPORATION.—

"(A) PRESUMPTION.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) EXCEPTION.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) DETERMINATION.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

"(i) the interrelation of operations;

"(ii) the common management;

"(iii) the centralized control of labor relations; and

"(iv) the common ownership or financial control, of the employer and the corporation.".

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

* * * *

TITLE IV—GENERAL PROVISIONS

* * * *

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

APPENDIX D

Section 1977 of the Revised Statutes, 42 U.S.C. § 1981 (1988)

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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No. 92-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM O. MOZEE, *et al.*,
Petitioners,

v.

AMERICAN COMMERCIAL MARINE SERVICE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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September 4, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly ruled that the Civil Rights Act of 1991 does not apply to cases pending on appeal on the Act's effective date?

LIST OF PARTIES

Petitioners have correctly identified all of the parties to the proceeding in the court below.

Respondent American Commercial Marine Service Company, Jeffboat Division (formerly Jeffboat, Inc.) is a wholly owned subsidiary of American Commercial Lines, Inc. There are no other subsidiaries of American Commercial Lines, Inc. that it does not wholly own.

American Commercial Lines, is a wholly owned subsidiary of CSX Corporation. Other subsidiaries of CSX Corporation that are not wholly owned by it or by a wholly owned subsidiary are listed in an appendix to this brief.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Commercial Marine Service Company, Jeffboat Division ("Jeffboat"),[1] hereby opposes the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

1. Petitioners William O. Mozee, Gregory L. Rankin, Frederick Williams, and Joe Malone, African-Americans who were formerly employed by Jeffboat, filed their class action race discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and

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[1] At the time this litigation commenced, Respondent's Jeffboat Division was separately incorporated as Jeffboat, Inc.

42 U.S.C. § 1981 in 1977, alleging that Respondent had engaged in a pattern and practice of race discrimination against its African-American employees. The individual complaint of petitioner Harold Barnes, filed in 1978, was consolidated with *Mozee* for trial, which was held over a four-month period in 1981-82. At the close of the evidence, the district court entered judgment in favor of Jeffboat and against Petitioners on each of their individual and class claims.

Petitioners appealed to the Seventh Circuit. The court of appeals vacated the district court's judgment and remanded for a new trial on the ground that "the findings of fact made after trial by the district court [are] insufficient to permit meaningful appellate review." *Mozee* v. *Jeffboat, Inc.*, 746 F.2d 365, 367 (7th Cir. 1984).

2. On remand to the district court, the parties submitted the written record from the first trial as part of the record to be considered by the court at the second trial. In addition, the parties presented additional evidence concerning Jeffboat's pre-1980 employment practices during the 1986 retrial.

On March 17, 1988, the district court issued its rulings on liability. The court acknowledged that Jeffboat had consistently hired African-Americans in greater numbers than their representation in the surrounding labor market. It also found that Jeffboat had not discriminated in the areas of training for higher-rated positions, promotion from bargaining unit positions to salaried nonunit foreman and higher managerial positions, special job assignments, and the assignment of employees to vacant positions in the bargaining unit in accordance with the seniority system in the applicable collective bargaining agreement. However, the court concluded that Plaintiffs had shown that Jeffboat had violated Title VII and Section 1981 in the selection of leadmen and gantry crane operators and in the imposition of discipline for violations of company rules.

Following this Court's decisions in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), Jeffboat requested reconsideration of certain of the liability findings. The district court concluded that its findings under Section 1981 survived *Patterson* and also declined to reconsider its rulings in light of *Wards Cove*.

On June 7, 1990, the district court determined the amounts of back pay to which the named plaintiffs were entitled under Title VII and Section 1981. Petitioners Mozee and Barnes, the only two plaintiffs with viable Section 1981 claims,[2] were also awarded $5,000 each for emotional distress. The court deferred consideration of any class-wide award of punitive damages under Section 1981. The district court then certified its liability orders for interlocutory review under 28 U.S.C. § 1292(b).

3. On August 14, 1991, the Seventh Circuit reversed the named plaintiffs' and the class-wide claims under Section 1981 based on *Patterson*. It affirmed the named plaintiffs' individual Title VII claims, and it affirmed the finding of class-wide liability under Title VII in promotions to the leadman and gantry crane operator positions. It vacated and remanded the findings of a class-wide Title VII violation based on Jeffboat's disciplinary practices.

4. While petitions for rehearing were pending, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("1991 CRA"). The Act became effective on November 21, 1991. The court of appeals asked the parties to brief the issue of the effects, if any, of the new statute on this case.

On May 7, 1992, the Seventh Circuit issued its decision on rehearing. Pet. App. 1a-24a. The court observed that the plaintiffs had argued that several sections of the 1991 CRA should be applied to this case: (1) Section 101(b),

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[2] The district court had dismissed the Section 1981 claims of the remaining named plaintiffs based on the statute of limitations.

"which expands the definition of what constitutes the making and enforcement of a contract for section 1981 claims"; (2) Sections 104 and 105, "which pertain to the business necessity defense for disparate impact cases under Title VII"; (3) Section 102, "which makes compensatory and punitive damages available for intentional discrimination claims under Title VII." Pet. App. 3a.[3]

The court first examined the language of the 1991 CRA and the legislative history of the 1991 Act. It concluded that "[a] clear indication of congressional intent cannot be deciphered from the legislative history or the 1991 Act's language." Pet. App. 8a.

The court then relied upon language in *Bennett* v. *New Jersey*, 470 U.S. 632, 639 (1985), for the proposition that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Pet. App. 13a. Accordingly, the court determined that none of the 1991 CRA's substantive changes should apply retroactively, either in the court of appeals or on remand in the district court. Pet. App. 13a-14a.

The court next considered whether to apply the 1991 Act's procedural and damages provisions on remand. It identified, but declined to decide, the issue of whether these provisions generally should be applied in a pending case challenging preenactment employer conduct where no proceedings had as yet taken place in the district court.[4]

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[3] The court noted that plaintiffs had also referred to Section 102(c), "which pertains to the availability of a jury trial under Title VII," but observed that they had apparently conceded that any right to a jury trial as a result of Section 102(c) had been waived. Pet. App. 3a & n.1. In their petition to this Court, Petitioners confirm that the availability of a jury trial under Section 102(c) of the 1991 CRA is not at issue here. Pet. 5 n.4.

[4] The court observed that the Sixth Circuit's recent decision in *Vogel* v. *Cincinnati*, 959 F.2d 594 (6th Cir. 1992), stood for the proposition that, because some of the 1991 Act's provisions affected

Instead, the court noted that its earlier decision had affirmed in part, reversed in part, and vacated and remanded in part the district court's liability findings. Accordingly, the remand would not require an entirely new proceeding. Under these circumstances, the court decided that it would be confusing and inequitable to apply procedural and damages changes flowing from the 1991 CRA to this case on remand. "Considering that the interlocutory remand in *Mozee II* will not initiate an entirely new proceeding, the district court should not apply any of the 1991 Civil Rights Act's provisions on remand." Pet. App. 21a.

ARGUMENT

Contrary to Petitioners' assertions, this does not present any issues mertiting review by this Court. The courts of appeals have uniformly ruled that the 1991 Civil Rights Act does not apply retroactively to cases pending on appeal on the date of its enactment. Nor does this case present an appropriate vehicle for resolving whatever tension may exist in other contexts and under other statutes concerning this Court's decisions on retroactivity; the courts of appeals have concluded that the 1991 CRA does not apply to cases pending on appeal on its effective date regardless of which of this Court's precedents are followed.

In addition, the decision below is correct. The court properly applied this Court's decisions and reached a result consistent with the intent of the 1991 CRA as manifested in both the legislative and executive branches. Finally, the unique procedural posture of this case makes it an unsuitable vehicle for determining whether the 1991 CRA applies generally to cases challenging pre-enactment conduct, even if that general issue otherwise warranted review by this Court.

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substantive rights, the entire act should be applied prospectively and commented that "[t]his position is not without merit." Pet. App. 21a.

1. As Petitioners acknowledge (Pet. 13-15), every court of appeals that has considered the effect of the 1991 CRA on cases pending on the Act's effective date has held that the Act does not apply. The Fifth, Sixth, Seventh, and Eighth Circuits all have concluded that the 1991 CRA does not apply retroactively to pending cases.[5] In particular, these courts have uniformly determined that it would be inappropriate to give a retroactive application to the three 1991 CRA sections that Petitioners urge this Court to apply in this case—Sections 101, 102, and 105.

The courts of appeals in the remaining circuits have not yet addressed the retroactivity of the 1991 CRA. While some early district court decisions in those circuits applied the amendments retroactively (see Pet. 15-17), more recent district court decisions from those circuits, issued in the wake of the uniform court of appeals rulings cited above, have found almost universally that the 1991 CRA does not apply to cases pending on the effective date.[6]

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[5] In addition to the decision below, see *Johnson* v. *Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Landgraf* v. *USI Film Products*, 1992 WL 178737 (5th Cir. July 30, 1992); *Rowe* v. *Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Vogel* v. *City of Cincinnati*, 958 F.2d 594 (6th Cir. 1992), *petition for cert. filed*, No. 91-2001, 60 U.S.L.W. 3881 (June 11, 1992); *Luddington* v. *Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992), *petition for rehearing filed*, No. 91-2320 (7th Cir. July 13, 1992); *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), *petition for rehearing filed*, Nos. 91-2439, 91-2443, and 91-2713 (8th Cir. Apr. 27, 1992); *Valdez* v. *Mercy Hosp.*, 961 F.2d 1401 (8th Cir. 1992); *Huey* v. *Sullivan*, 1992 WL 181142 (8th Cir. July 30, 1992); *Parton* v. *GTE North, Inc.*, 1992 WL 179687 (8th Cir. July 31, 1992).

[6] Cases from other circuits that have relied upon and followed the uniform court of appeals decisions include:

First Circuit—*Virapen* v. *Eli Lilly, S.A.*, 1992 WL 150879 (D. P.R. June 25, 1992).

Second Circuit—*Gilmore* v. *Local 295, Teamsters*, 1992 WL 188300 (S.D. N.Y. Aug. 6, 1992); *Stout* v. *International Business Machines*, 1992 WL 166846 (S.D. N.Y. July 16, 1992; *Kelber* v.

There is no reason to presume that those circuits will not join the four that have to date found the Act to be prospective only. If not, however, this Court could review the issue at that time. S.Ct. Rule 10.1.

2. This case also presents a poor vehicle to resolve any tension that may exist among different decisions of this

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Forest Electric Corp., 1992 WL 189247 (S.D. N.Y. July 7, 1992); *Boss* v. *Board of Ed., Union Free School Dist.*, 1992 WL 160398 (E.D. N.Y. July 6, 1992); *Smith* v. *Petra Cablevision Corp.*, 1992 WL 108356 (E.D. N.Y. May 20, 1992); *Sava* v. *General Electric Co.*, 789 F.Supp. 78 (D. Conn. 1992).

Third Circuit—*Aiken* v. *Bucks Ass'n for Retarded Citizens, Inc.*, 1992 WL 186582 (E.D. Pa. July 14, 1992); *Thompson* v. *Prudential Inc. Co. of America*, 1992 WL 140825 (D. N.J. June 23, 1992); *Neibauer* v. *Philadelphia College of Pharmacy and Science*, 1992 WL 151321 (E.D. Pa. June 19, 1992); *Konstantopoulos* v. *Westvaco Corp.*, 1992 WL 162957 (D. Del. June 19, 1992); *Crumley* v. *Delaware State College*, 1992 WL 142243 (D. Del. June 11, 1992); *Haynes* v. *Glen Mills Schools*, 1992 WL 97904 (E.D. Pa. May 6, 1992).

Fourth Circuit—*Pagana-Fay* v. *Washington Suburban San. Comm'n*, 1992 WL 159904 (D. Md. July 8, 1992); *Boyce* v. *Fleet Finance, Inc.*, 1992 WL 191596 (E.D. Va. July 7, 1992); *Wallace* v. *Housing Auth. of the City of Columbia*, 791 F.Supp. 137 (D. S.C. 1992).

Tenth Circuit—*Bullock* v. *Dillard Dept. Stores, Inc.*, 1992 WL 167015 (D. Kan. June 1, 1992); *Donaldson* v. *Brady*, 1992 WL 119497 (D. Colo. May 14, 1992); *Maxwell* v. *Handicapped Educ. & Living Programs, Inc.*, 1992 WL 97801 (D. Kan. Apr. 13, 1992); *Brown* v. *Anheuser-Busch, Inc.*, 1992 WL 78065 (D. Colo. Mar. 31, 1992).

Eleventh Circuit—*King* v. *Tandy Corp.*, 1992 WL 174289 (M.D. Ga. July 24, 1992).

Contra, *Wisdom* v. *Intrepid Sea-Air Museum*, 1992 WL 168224 (S.D. N.Y. June 26, 1992); *Jaekel* v. *Equifax Marketing Decisions Systems, Inc.*, 1992 U.S. Dist. LEXIS 9489 (E.D. Va. June 26, 1992); *Tyler* v. *Commonwealth of Pa., Dept. of Revenue*, 1992 WL 133481 (M.D. Pa. June 4, 1992); *Savko* v. *Port Auth. of Allegheny County*, 1992 WL 110466 (W.D. Pa. May 22, 1992); *Robinson* v. *Davis Memorial Goodwill Indus.*, 790 F.Supp. 325 (D.D.C. 1992).

Court on the general issue of retroactivity. To be sure, there has on occasion been some confusion among lower federal courts concerning other federal statutes (see Pet. 8-13). But there have been no such conflicting court of appeals decisions under the 1991 CRA. The courts of appeals, including the court below, have uniformly ruled that the 1991 CRA does not apply to cases pending on appeal on the Act's effective date regardless of which of this Court's decisions are applied. *Compare Bennett, supra*, and *Bowen* v. *Georgetown Univ. Hosp.* 488 U.S. 204 (1988), with *Thorpe* v. *Housing Auth. of the City of Durham*, 393 U.S. 268 (1968), and *Bradley* v. *School Board*, 416 U.S. 696 (1974).

Accordingly, if some clarification of the general rules on the application of newly enacted statutes to pending cases is necessary, it should arise under circumstances where the courts disagree about the proper approach to the particular statute at issue. In that way, the clarification will affect the outcome of the case.

3. Nor is there merit in Petitioners' assertions that the petition should be granted because the decision below was in error.

No court of appeals has accepted Petitioner's argument (Pet. 18) that Section 101 of the 1991 CRA should be applied retroactively because it merely resulted in the prohibition of conduct already subject to Title VII. As Judge Posner demonstrated in writing for the court in *Luddington*, Section 101 is clearly substantive, bringing as it does new forms of employer conduct (*e.g.*, discharges and refusals to make an ordinary promotion or a lateral transfer) within the scope of 42 U.S.C. § 1981's prohibitions. 966 F.2d at 229.[7] Moreover, even if the expansion

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[7] Petitioners are in error when they assert that Section 1981 and Title VII are merely substantive duplicates of each other. Section 1981 applies to many employers not covered by Title VII: those with fewer than 15 employees. *See* Title VII § 701(b), 42 U.S.C. § 2000e(b). Moreover, claims under Title VII must be filed

of Section 1981's coverage could be characterized as merely an enhancement of the remedies available to victims of employment discrimination, the impact of that change requires that it be made on a prospective basis only, as Judge Posner explained:

> It could be argued that since the underlying norm of nondiscrimination was not new, employers should not be heard to complain that the norm has now been given teeth. But many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the ex post facto clause. *Miller* v. *Florida*, 482 U.S. 423 (1987); *Sequoia Books, Inc.* v. *Ingemunson*, 901 F.2d 630, 639 (7th Cir. 1990). The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change.

966 F.2d at 229.

For these same reasons, there is no merit to Petitioners' claim (Pet. 18-19) that the court below erred in not applying on remand the new provisions for compensatory and

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with the Equal Employment Opportunity Commission within at most 300 days of the challenged employer action. Title VII § 706(e), 42 U.S.C. § 2000e-5(e). Claims under Section 1981 can be brought directly to court within a limitations period borrowed from applicable state law (*see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975)), which is generally longer than the charge-filing period under Title VII. Accordingly, employees whose Title VII claims are barred because they were not pursued in timely fashion may still be able to pursue claims of violations under Section 1981. Under these circumstances, it can hardly be argued that the 1991 CRA's expansion of conduct prohibited under Section 1981 did not alter an employer's substantive obligations or expose an employer to substantially greater liabilities.

punitive damages under Title VII in Section 102 of the 1991 CRA. Subjecting Jeffboat to damages of up to $300,000 per claimant, in addition to back pay and other equitable relief, for conduct that occurred nearly 20 years before the 1991 CRA's passage would result in manifest injustice. As the Fifth Circuit explained in *Landgraf*, 1992 WL 178737, *5, "[t]here is a practical point at which a dramatic change in the remedial consequences of a rule works changé in the normative reach of the rule itself."

Second, Petitioners err when they assert that the court below failed to acknowledge that Congress' intent in enacting Section 101 was merely to "restore" the interpretation of Section 1981 that certain lower courts had given it prior to *Patterson*. Pet. 18. The express terms of the 1991 CRA belie any such restorative purpose. The congressional "findings" accompanying the 1991 Act refer in forward-looking terms to the need for "*additional* remedies" and "*additional* protections" against unlawful employment discrimination. 1991 CRA § 2 (emphasis added). Pet. App. 64a. The "purposes" of the Act set forth in Section 3 are similarly prospective in nature.[8]

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[8] 1991 CRA § 3 (Pet. App. 64a-65a) provides (emphasis added):

> The purposes of this Act are—
>
> (1) *to provide appropriate remedies* for intentional discrimination and unlawful harassment in the workplace;
>
> (2) *to codify the concepts* of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
>
> (3) *to confirm statutory authority and provide statutory guidelines* for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
>
> (4) *to respond* to recent decisions of the Supreme Court *by expanding the scope* of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Notably absent is any stated purpose to "restore" the law.[9]

Finally, as Petitioners acknowledge (Pet. 20 n.16), every court of appeals has rejected their argument that the plain language of the 1991 CRA establishes that it must be retroactively applied. No court of appeals has found that the inclusion of the special provision in Section 402(b), negating any possible retroactive application to the Wards Cove Packing Company of the new burdens of persuasion in 1991 CRA § 105, or Section 109(c), which ensures that the new imposition of liability on employers for extraterritorial conduct does not apply retroactively, establishes that it was Congress' intent that the Act as a whole applies to pending cases. *See Fray*, 960 F.2d at 1376-77; *Johnson*, 965 F.2d at 1373; *Mozee*, Pet. App. 5a-7a.

4. Finally, the instant case would be a poor vehicle for resolving the general issue of the impact of the 1991 CRA on pre-enactment employer conduct. The vast majority of cases in which this issue will arise are ones

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[9] In marked contrast, the 1990 Civil Rights Act, a precursor to the 1991 CRA that was vetoed by President Bush, contained an express statement of Congress' restorative purpose. The first stated purpose of the 1990 Act was to "respond to the Supreme Court's recent decisions *by restoring* the civil rights protections that were dramatically limited by those decisions. . . ." S. 2104, § 2(b)(1), 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H 9552 (daily ed. Oct. 12, 1990) (emphasis added). The civil rights bill that passed the House of Representatives early in the summer of 1991 contained an identical statement of congressional purpose. H.R. 1, § 2(b)(1), 102d Cong., 1st Sess. (1991), 137 Cong. Rec. H 3923 (daily ed. June 5, 1991). Consistent with such a purpose, both the 1990 Act and 1991's H.R. 1 were by their terms expressly retroactive and would have applied to pending cases, S. 2104, § 15(a), 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H 9552 (daily ed. Oct. 12, 1990); H.R. 1, § 15(a), 102d Cong., 1st Sess. (1991), 137 Cong. Rec. H 3923 (daily ed. June 5, 1991). When the Civil Rights Act of 1991 was passed, all references to "restorative" intent, like the provisions for express retroactivity, were deleted.

that were pending in the trial courts awaiting adjudication on the date of enactment or that will have been filed since November 21, 1991, but that challenge pre-enactment employment actions. Relatively few cases were, like the instant case, pending on appeal on the enactment date, and this special class of cases will soon have left the judicial system.

Moreover, this case was filed in 1977, had already been through two full trials on liability, and was pending before the court of appeals on an interlocutory appeal from all liability findings on the effective date of the new Act. The evidence presented by Petitioners at both the first and second trials largely centered on Respondent's employment practices during the latter half of the 1970's, nearly two decades before the 1991 Act's passage. In its August 14, 1991, initial opinion, the court below disposed of virtually all of the liability issues, leaving the district court only to reconsider its findings on classwide disciplinary claims under Title VII (and to take additional evidence on this one issue if the court sees fit).

Under these special circumstances, the court below properly applied equity and justice in its determination that Respondent not be subjected to new substantive rules and unanticipated new liabilities years after the fact. As Judge Wood explained for the court:

> We must remember that this case has been in litigation for fifteen years. A remand under a new statute after fifteen years of litigation seems anything but just.

Pet. App. 17a-18a n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 4, 1992

APPENDIX

RELATED PARTIES

The subsidiaries of CSX Corporation that are not wholly owned by it or by a wholly owned subsidiary are:

Akron and Barberton Belt Railroad Company
Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company
Baronial Transportation Corporation
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Rail Road Company of South Carolina
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Green Real Estate Company
Home Avenue Railroad Company
Lakefront Dock and Railroad Terminal Company
Mid Allegheny Corporation
Nicholas, Fayette and Greenbrier Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company
RF&P Corporation
Terminal Railroad Association of St. Louis
Trailer Train Company
Wesjax Development Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company
Yukon Pacific Corporation

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No. 92-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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Petitioners,
v.
AMERICAN COMMERCIAL MARINE SERVICE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent American Commercial Marine Service Company, Jeffboat Division, submits this Supplemental Brief in Opposition pursuant to Supreme Court Rule 15.7 in order to call to this Court's attention the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Gersman* v. *Group Health Ass'n, Inc.*, No. 89-5482, 1992 U.S. App. LEXIS 21615 (D.C. Cir. Sept. 15, 1992).

As Respondent explained at pp. 6-7 of its Brief in Opposition, every court of appeals to have considered the effect of the 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat., on cases pending on November 21, 1991, the Act's effective date, has held that the Act does not apply. The D.C. Circuit has now joined the Fifth, Sixth, Seventh, and Eighth Circuits. In *Gersman*, the D.C. Circuit ruled

that Section 101 of the 1991 Act, which modified 42 U.S.C. § 1981, does not apply retroactively to pending cases seeking redress under Section 1981 for conduct occurring prior to the 1991 Act's enactment.

CONCLUSION

The petition for a writ of certiorari should be denied.

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